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Nos. 79-983 and 79-1689

In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, APPELLANT

v.

HUBERT L. WILL, ET AL.

UNITED STATES OF AMERICA, APPELLANT

v.

HUBERT L. WILL, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	3
Constitutional and statutory provisions involved	4
Statement	4
Summary of argument	17
Argument	23
I. The court has jurisdiction over the present appeals	23
A. The jurisdictional requirements for an appeal under 28 U.S.C. 1252 are satisfied in these cases	23
B. Under the "rule of necessity," neither the district judge nor the justices of this court are disqualified from participating in the disposition of these cases by virtue of 28 U.S.C. 455	24
II. As a matter of statutory construction, the Pay Acts served to supersede or rescind the annual salary increases authorized for Article III judges by the Adjustment Act	32
A. The Pay Acts were intended substantively to supersede the provisions of the Adjustment Act	32
B. The 1979 Pay Act is applicable to Article III judges	48
III. The 1976, 1977, and 1978 Pay Acts did not diminish the compensation of Article III judges	51
IV. The Compensation Clause is not violated by a statutory diminution of judicial salaries that does not discriminate against Article III judges or undermine their independence	60

Page

Conclusion 69
Appendix 1a

CITATIONS

Cases:

Andrus v. *Sierra Club*, 442 U.S. 347 35
Atkins v. *United States*, 556 F.2d 1028, cert. denied, 434 U.S. 1009 ..... Passim
Baker v. *Commissioner*, 149 F.2d 342, cert. denied, 326 U.S. 746 64
Belknap v. *United States*, 150 U.S. 588 .... 19, 35, 36
Benedict v. *United States*, 176 U.S. 537 53
Board of Regents v. *Roth*, 408 U.S. 564 53
Bonner v. *Wyrick*, 563 F.2d 1293, cert. denied, 439 U.S. 913 31
Booth v. *United States*, 291 U.S. 339 ..... 67, 68
Brinkley v. *Hassig*, 83 F.2d 351 27
Burgess v. *Salmon*, 97 U.S. 381 60
Butler v. *Pennsylvania*, 51 U.S. (10 How.) 402 54
Callanan v. *United States*, 364 U.S. 587 28
Cannon v. *University of Chicago*, 441 U.S. 677 28
Central Maryland Lines, Inc. v. *United States*, 240 F. Supp. 254 60
City of Los Angeles v. *Adams*, 556 F.2d 40 .. 34, 35
City of Mobile, Alabama v. *Bolden*, No. 77-1844 (Apr. 22, 1980) 32, 64
Dacey v. *Connecticut Bar Association*, 170 Conn. 520, 368 A.2d 125 31
Dacey v. *Dorsey*, 568 F.2d 275, cert. denied, 463 U.S. 906 31
Director, Office of Workers' Compensation Programs v. *National Mines Corp.*, 554 F.2d 632 34
Director, Office of Workmen's Compensation Program v. *Alabama By-Products Corp.*, 560 F.2d 710 34

Cases—Continued Page

Duplantier v. *United States*, 606 F.2d 654, petition for cert. pending on other grounds, No. 79-1180 (filed Jan. 31, 1980 31
Evans v. *Gore*, 253 U.S. 245 ..... 22, 26, 27, 28, 30 61, 63, 64, 67
FTC v. *Cement Institute*, 333 U.S. 683 27
Fletcher v. *Peck*, 10 U.S. (6 Cranch) 87 54
Foley v. *Carter*, Civ. No. 79-3063 (D.D.C. Mar. 24, 1980), appeal pending, Nos. 80-1548, 80-1551 (D.C. Cir. filed May 21, 1980) 31, 49, 50
Fusari v. *Steinberg*, 419 U.S. 379 32
Glidden Co. v. *Zdanok*, 370 U.S. 530 54
Gooding v. *United States*, 416 U.S. 430 28
Greenholtz v. *Nebraska Penal Inmates*, 442 U.S. 1 54
Gunn v. *Dallman*, 171 F.2d 36, cert. denied, 336 U.S. 937 64
Lapeyre v. *United States*, 84 U.S. (17 Wal.) 191 60
Louisville v. *Savings Bank*, 104 U.S. 469 60
Magruder v. *Brown*, 106 F.2d 428, cert. denied, 308 U.S. 624 ..... 63, 64
McCorkle v. *United States*, 559 F.2d 1258, cert. denied, 434 U.S. 1011..... 10
McLucas v. *DeChamplain*, 421 U.S. 21 ..... 24, 32
Meeropol v. *Nizer*, 429 U.S. 1337..... 27
Miles v. *Graham*, 268 U.S. 501..... 28, 63
Morton v. *Mancari*, 417 U.S. 535..... 35
National Treasury Employees Union v. *Nixon*, 429 F.2d 587 8
Nellius v. *Stiftel*, 402 A.2d 359 31
New Mexico Natural Gas Antitrust Litigation, In re, Nos. 80-1343, 80-1317 (10th Cir. May 5, 1980) 25
North American Co. v. *SEC*, 327 U.S. 686 ... 28
O'Donoghue v. *United States*, 289 U.S. 516 ..... 61, 67, 68

Cases—Continued Page

Olson v. *Cory*, 93 Cal. App. 3d 942, 156 Cal. Rptr. 127, rev'd, 26 Cal. 3d 672, 609 P.2d 991, 164 Cal. Rptr. 217 ..... 31, 55, 59
O'Malley v. *Woodrough*, 307 U.S. 277 ....22, 28, 62, 63, 64, 65, 68
Owen v. *City of Independence, Missouri*, No. 78-1179 (Apr. 16, 1980) 28
Personnel Administrator of Massachusetts v. *Feeney*, 442 U.S. 256 65
Pilla v. *American Bar Association* 542 F.2d 56 31
Posadas v. *National City Bank*, 296 U.S. 497 34
Pressler v. *Simon*, 428 F. Supp. 302, vacated and remanded, 431 U.S. 169, order reinstated, Civ. No. 76-782 (D.D.C. July 19, 1977), aff'd, 434 U.S. 1028..... 5, 6, 40
Preterm, Inc., v. *Dukakis*, 591 F.2d 121, cert. denied, 441 U.S. 952..... 33, 34, 35
Robertson v. *Railroad Labor Board*, 268 U.S. 619 28
Schwab v. *Ariyoshi*, 57 Haw. 348, 555 P.2d 1329 31
Stiftel v. *Malarkey*, 384 A.2d 9..... 56
Swain v. *Pressley*, 430 U.S. 372..... 6
Taylor v. *Brown*, 147 U.S. 640 60
Toth v. *Quarles*, 350 U.S. 11 62
TVA v. *Hill*, 437 U.S. 153 34
United States v. *Casson*, 434 F.2d 415 60
United States v. *Clark*, No. 78-1513 (Feb. 26, 1980) 32
United States v. *Corrigan*, 401 F. Supp. 795 ... 31
United States v. *Dickerson*, 310 U.S. 554 ..... 19, 33, 34, 41, 54
United States v. *Larionoff*, 431 U.S. 864 54
United States v. *Mitchell*, 109 U.S. 146 .. 19, 35, 41
United States v. *More*, 7 U.S. (3 Cranch) 159... 56
United States v. *Norton*, 97 U.S. 164 60

Cases—Continued

	Page
United States v. *Raines*, 362 U.S. 17	32
United States v. *Rock Royal Co-operative, Inc.*, 307 U.S. 533	32
Virginia Electric and Power Co., In re, 539 F.2d 357	25
Zbaraz v. *Quern*, 596 F.2d 196	33, 35

Constitution, statutes and rules:

United States Constitution, Article III	*passim*
Executive Salary Cost-of-Living Adjustment Act, Pub. L. No. 94-82, 89 Stat. 419, scattered sections throughout 28 U.S.C.:	
	Page
28 U.S.C. 5	6
28 U.S.C. 44(d)	6
28 U.S.C. 135	6
28 U.S.C. 173	6
28 U.S.C. 213	6
28 U.S.C. 252	6
28 U.S.C. 461	6, 41
28 U.S.C. 461(a)	8
28 U.S.C. 461(b)	7
28 U.S.C. 792	6
Federal Pay Comparability Act of 1970, 5 U.S.C. 5301 *et seq.*:	
5 U.S.C. 5301(a)	7
5 U.S.C. 5305	6, 7
5 U.S.C. 5305(a)(1)	7
5 U.S.C. 5305(a)(1)(A)	7
5 U.S.C. 5305(a)(2)	7
5 U.S.C. 5305(a)(3)	7
5 U.S.C. 5305(c)(1)	7
5 U.S.C. 5305(c)(2)	8, 12
5 U.S.C. 5305(m)	8
5 U.S.C. 5306	7
5 U.S.C. 5308	6, 10
Legislative Branch Appropriation Act of 1977, Pub. L. No. 94-440, 90 Stat. 1439	3, 4, 9

Constitution, statutes and rules—Continued Page

Legislative Branch Appropriation Act of 1978, Pub L. No. 95-66, 91 Stat. 270 ..... 3, 4, 9
Legislative Branch Appropriation Act of 1979, Pub. L. No. 95-391, Section 304(a)(1), 92 Stat. 788 ..... 3, 4, 11
Postal Revenue and Federal Salary Act of 1967, Pub. L. No. 90-206, Title II, Section 225(a)-(k), 81 Stat. 642, 2 U.S.C. (and Supp.I) 351 *et seq.*:
2 U.S.C. 352 5
2 U.S.C. 356 5
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2 U.S.C. 358 5
2 U.S.C. (Supp. I) 359 5
2 U.S.C. 361 5
Tucker Act, 28 U.S.C. 1346(a)(2) 13
Pub. L. No. 94-82, 89 Stat. 419 6
Pub. L. No. 94-82, 89 Stat. 423 5
Pub. L. No. 96-86, 93 Stat. 656 ..... 4, 12
36 Stat. 1090 30
62 Stat. 908 30
2 U.S.C. 31 6
3 U.S.C. 104 6
5 U.S.C. 5101 *et seq.* 5
5 U.S.C. 5318 6
5 U.S.C. 5331 *et seq.* 5
5 U.S.C. 5504 8
5 U.S.C. 5505 8
5 U.S.C. 5541(2)(i) 8
10 U.S.C. 867(a)(1) 6
11 U.S.C. 68 6
26 U.S.C. 7443(c) 6
28 U.S.C. 1 27
28 U.S.C. 291 *et seq.* 27
28 U.S.C. 416 6
28 U.S.C. 455 ..... *passim*, 1a
28 U.S.C. 455(a) 18, 26, 29, 1a
28 U.S.C. 455(b) 26, 29, 1a

Constitution, statutes and rules—Continued Page

28 U.S.C. 455(b)(4 ..... 18, 25, 26 1a
28 U.S.C. 455(b)(5)(i) 18, 25, 1a
28 U.S.C. (and Supp. II) 603 6
28 U.S.C. 1252 .....17, 19, 23, 31, 32
28 U.S.C. 2109 27
D.C. Code §§11-703(b), 11-901 (1973) 6
Fed. R. Civ. P. 23(b)(2) 4, 14, 17, 25
Sup. Ct. R. 16(6) 23

Miscellaneous:
Advisory Committee on Judicial Activities:
Advisory Opinion No. 26 (Jan. 22, 1973) 31
Advisory Opinion No. 45 (Feb. 24, 1975).... 31
Advisory Opinion No. 52 (Aug. 15, 1977)... 31
Advisory Opinion No. 62 (undated) 31
121 Cong. Rec. (1975):
p. 25374 53
p. 25382 53
p. 25745 53
122 Cong. Rec. (1976):
p. 28861 37
p. 28862 37
p. 28863 37
p. 28865 ..... 37, 38
p. 28866 37
p. 28870 38
p. 28871 38
p. 28872 ..... 37, 38
p. 28874 38
p. 28875 38
p. 28876 ..... 37, 38
p. 28877 ..... 37, 38
p. 28878 38
p. 28879 38
p. 28880 38
p. 28881 ..... 38, 59
pp. 28886-28887 38

Miscellaneous—Continued Page

p. 29130 39
p. 29131 39
p. 29132 ..... 37, 39
p. 29133 37
p. 29164 39
p. 29168 40
p. 29171 ..... 37, 39
p. 29172 39
p. 29371 39
p. 29372 39
p. 29374 40
p. 29377 ..... 37, 59
p. 31859 ..... 37, 40
p. 31862 40
p. 31863 59
p. 31892 38
p. 31893 38
pp. 31896–31897 ..... 39, 60
123 Cong. Rec. (1977):
p. 7094 40
p. 7095 ..... 40, 43
p. 7096 43
p. 7125 43
p. 7126 43
p. 21121 43
p. 21123 43
p. 21124 43
p. 21125 43
124 Cong. Rec.:
p. H5507 (daily ed. June 14, 1978) 45
p. H5508 (daily ed. June 14, 1978) 45
p. H5509 (daily ed. June 14, 1978) 45
p. H5510 (daily ed. June 14, 1978) 45
p. S12614 (daily ed. Aug. 4, 1978) 45
125 Cong. Rec.:
pp. H8138–H8139 (daily ed. Sept. 19, 1979) 50
p. H8444 (daily ed. Sept. 25, 1979) 51

Miscellaneous—Continued Page

p. H8850 (daily ed. Oct. 9, 1979)..... 48, 50
p. H8852 (daily ed. Oct. 9, 1979)..... 48, 50
p. H8853 (daily ed. Oct. 9, 1979)..... 50
p. H8854 (daily ed. Oct. 9, 1979)..... 48, 50
p. H9076 (daily ed. Oct. 12, 1979) 48
p. H9080 (daily ed. Oct. 12, 1979 48
p. S14320 (daily ed. Oct. 10, 1979) 48
p. S14483 (daily ed. Oct. 12, 1979) 48
p. S14484 (daily ed. Oct. 12, 1979) 48
p. S14486 (daily ed. Oct. 12, 1979) 48, 50
pp. S14486–S14487 (daily ed. Oct. 12, 1979) 50
p. S16706 (daily ed. Nov. 15, 1979) ... 48, 50, 55
p. S16707 (daily ed. Nov. 15, 1979) 49
p. S16708 (daily ed. Nov. 15, 1979) 55
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Diminution of Judicial Salaries—A Consideration of the Constitutional Issue Raised by the Action of Congress With Respect to Judicial Salaries, reprinted in 125 Cong. Rec. S16706 (daily ed. Nov. 15, 1979) 35
Exec. Order No. 11883, 3 C.F.R. 1024 (1971-1975 Compilation 8
Exec. Order No. 11941, 3 C.F.R. 151 (1976 Compilation) 9, 60
Exec. Order No. 12010, 3 C.F.R. 142 (1977 Compilation) 11
Exec. Order No. 12087, 3 C.F.R. 234 (1978 Compilation) 11
Exec. Order No. 12165, 44 Fed. Reg. 58671 (1979)..... 12
Exec. Order No. 12200, 45 Fed. Reg. 16443 (1980)..... 12
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69 F.R.D. 273 (1975)..... 26

Miscellaneous—Continued Page

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Fellman, *The Diminution of Judicial Salaries*, 24 Iowa L. Rev. 89 (1938) 57
Frank, *Disqualification of Judges*, 56 Yale L.J. 605 (1947) 28
Frank, *Disqualification of Judges: In Support of the Bayh Bill*, 35 Law & Contemp. Prob. 43 (1970) 28
53 Harv. L. Rev. 137 (1939) 64
Hearings on S. 1064 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 93d Cong., 1st Sess. (1973) 25, 30
H.R. Conf. Rep. No. 96-513, 96th Cong., 1st Sess. (1979) 47-48, 50
H.R. Conf. Rep. No. 94-1559, 94th Cong., 2d Sess. (1976) 37
H.R. Rep. No. 93-1453, 93d Cong. 2d Sess. (1974) 26, 29
H.R. Rep. No. 95-458, 95th Cong. 1st Sess. (1977) 9, 10, 42
H.R. Rep. No. 95-1254, 95th Cong., 2d Sess. (1978) 44
H.R. Rep. No. 96-500, 96th Cong., 1st Sess. (1979) 46, 47
15 Ind. L.J. 159 (1939) 64
3B *Moore's Federal Practice* (2d ed. 1980) 25
Rosenn, *The Constitutional Guaranty Against Diminution of Judicial Compensation*, 24 U.C.L.A. L. Rev. 308 (1976) 57, 64
S. Rep. No. 93-419, 93d Cong., 1st Sess. (1973) 26, 29
S. Rep. No. 94-333, 94th Cong., 1st Sess. (1975) 5, 52
S. Rep. No. 94-1201, 94th Cong., 2d Sess. (1976) 37, 39
S. Rep. No. 95-1024, 95th Cong., 2d Sess. (1978) 44

Miscellaneous—Continued

Page

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E. Thode, *Reporter's Notes to Code of Judicial Conduct* (1973) 25
11 Weekly Comp. of Pres. Doc. 910 (Aug. 29, 1975) 8
12 Weekly Comp. of Pres. Doc. 1435 (Oct. 1, 1976) 9
13 Weekly Comp. of Pres. Doc. 1436 (Sept. 29, 1977) 11
14 Weekly Comp. of Pres. Doc. 1732 (Oct. 10, 1978) 11
15 Weekly Comp. of Pres. Doc. 1530 (Aug. 31, 1979) 11
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OPINIONS BELOW

The opinion of the district court in No. 79-983 (J.S. App. 1a-19a) is reported at 478 F. Supp. 621. The opinion

of the district court in No. 79–1689 (J.S. App. 1a–10a) is not yet reported.

JURISDICTION

The order of the district court granting summary judgment against the United States in No. 79–983 was entered on August 29, 1979. The United States filed a notice of appeal from this order on September 26, 1979 (J.S. App. 22a–23a).[1] On November 19, 1979, Mr. Justice Stevens extended the time for docketing the appeal to and including December 24, 1979. The Jurisdictional Statement was filed on December 21, 1979. On February 19, 1980, the Court postponed further consideration of the question of jurisdiction to the hearing on the merits (J.A. 56a).

The judgment of the district court in No. 79–1689 (J.S. App. 11a–12a) was entered on February 12, 1980. The United States filed a notice of appeal on March 10, 1980 (J.S. App. 13a). The Jurisdictional Statement was filed on April 25, 1980. On June 16, 1980, the Court postponed further consideration of the question of jurisdiction to the hearing on the merits and consolidated the two cases for briefing and oral argument (J.A. 76a).

The jurisdiction of this Court in both cases rests upon 28 U.S.C. 1252. *United States* v. *Clark*, No. 78–1513

[1] On September 24, 1979, the clerk of the district court entered judgment (J.S. App. 20a–21a) on the district court's decision. The government was unaware of the entry of this judgment at the time it filed the notice of appeal on September 26, 1979. As a precaution, on October 17, 1979, the United States filed a notice of appeal (J.S. App. 24a–25a) from the September 24 judgment. Because 28 U.S.C. 1252 permits a direct appeal to this Court from an "interlocutory or final judgment, decree or order * * * holding an Act of Congress unconstitutional in any civil action * * * to which the United States * * * is a party," and because 28 U.S.C. 2101(a) requires the notice of appeal in such cases to be filed within 30 days "after the entry of the interlocutory or final order, judgment or decree," it appears that the operative notice of appeal is the one filed on September 26, 1979.

(Feb. 26, 1980), slip op. 3–4 n.2; *Weinberger* v. *Salfi*, 422 U.S. 749, 763 n.8 (1975); *McLucas* v. *DeChamplain*, 421 U.S. 21, 31–32 (1975).

QUESTIONS PRESENTED

1. Whether, as a matter of statutory construction, the 1976 Pay Act (Pub. L. No. 94–440, 90 Stat. 1439, 1446, 2 U.S.C. 356a), the 1977 Pay Act (Pub. L. No. 95–66, 91 Stat. 270), the 1978 Pay Act (Pub. L. No. 95–391, 92 Stat. 763, 788–789), and the 1979 Pay Act (Pub. L. No. 96–86, 93 Stat. 656, 657) served to supersede or rescind the cost-of-living increases authorized for Article III judges by the Executive Salary Cost-of-Living Adjustment Act for fiscal years 1977, 1978, 1979, and 1980.

2. Whether, at the time the 1976, 1977, and 1978 Pay Acts were enacted, the cost-of-living increases prescribed in the Adjustment Act constituted "compensation" of Article III judges within the meaning of the Compensation Clause of the Constitution, and thus whether the Pay Acts, in failing to allow the scheduled increases to occur, constituted a diminution of compensation.

3. Whether the 1976, 1977, and 1978 Pay Acts, which eliminated future salary increases scheduled for Article III judges under the Adjustment Act, and the 1979 Pay Act, which prospectively reduced the amount of a salary increase then in effect for Article III judges, violated the Compensation Clause, where the Acts did not represent a discriminatory attack on Article III judges and were not enacted with the purpose or effect of undermining the independence of Article III judges.[2]

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[2] In addition to the questions presented in the Jurisdictional Statements, the Court has directed the parties "to address the effect of 28 U.S.C. § 455 on the jurisdiction of the District Court and on the jurisdiction of this Court" (J.A. 56a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Compensation Clause of the Constitution, the pertinent portions of the applicable salary statutes, and 28 U.S.C. 2109 are set forth in the appendices to the Jurisdictional Statements (79-983 J.S. App. 26a-33a; 79-1689 J.S. App. 14a-26a). 28 U.S.C. 455 is set forth in the Appendix, *infra*, 1a-3a.

STATEMENT

These cases are class actions brought under Fed. R. Civ. P. 23(b)(2) on behalf of Article III judges. In No. 79-983 (*Will I*), the district court held that the 1976 Pay Act (Pub. L. No. 94-440, 90 Stat. 1439, 1446, 2 U.S.C. 356a) and the 1977 Pay Act (Pub. L. No. 95-66, 91 Stat. 270) violated the Compensation Clause of the Constitution (Article III, Section 1; 79-983 J.S. App. 26a) by failing to increase the salary of Article III judges for fiscal years 1977 and 1978 in accordance with the Executive Salary Cost-of-Living Adjustment Act ("Adjustment Act") (79-1689 J.S. App. 14a-17a). The court held in addition that, as a matter of statutory construction, the Pay Acts did not modify or repeal the judges' substantive entitlement to the annual cost-of-living increases authorized by the Adjustment Act. In No. 79-1689 (*Will II*), the same district judge, relying on his decision in *Will I*, reached the same constitutional and statutory conclusions in regard to the 1978 Pay Act (Pub. L. No. 95-391, 92 Stat. 763, 788-789) and the 1979 Pay Act (Pub. L. No. 96-86, 93 Stat. 656, 657).

1. The federal pay system consists of a complex array of statutory and regulatory provisions. Insofar as pertinent here, this system may be summarized as follows.

The salaries of federal judges, as well as those of the Vice President, Cabinet officers and other heads of agencies, members of Congress, and additional designated officials of the executive, legislative, and judicial branches, are determined pursuant to the Postal Revenue and Federal Salary Act of 1967, Pub. L. No. 90–206, Title II, Section 225(a)–(k), 81 Stat. 642–645, 2 U.S.C. 351–361 ("Federal Salary Act"). See 2 U.S.C. 356.[3] Under this Act, the salaries of these officials are reviewed every four years (commencing in fiscal year 1969) by the Commission on Executive, Legislative, and Judicial Salaries appointed in accordance with the terms of the statute. See 2 U.S.C. 352, 356. This "review by the Commission shall be made for the purpose of determining and providing (i) the appropriate pay levels and relationships between and among the respective offices and positions covered by such review, and (ii) the appropriate pay relationships between such offices and positions and the offices and positions subject to [classification and General Schedule (GS) pay rates under 5 U.S.C. 5101 *et seq.*, 5331 *et seq.*]." 2 U.S.C. 356. The Commission then reports to the President the results of its review and its salary recommendations. 2 U.S.C. 357. Thereafter, in the next budget transmitted to Congress, the President recommends the exact rates of pay that he deems advisable for each of these offices and positions. 2 U.S.C. 358. The President's recommendations become final and effective, at the time provided in the Act, following approval by both Houses of Congress. 2 U.S.C. (Supp. I) 359. See *Pressler* v. *Simon*, 428 F. Supp. 302 (D.D.C. 1976) (three-judge court), vacated and remanded, 431 U.S. 169 (1977), order reinstated, Civ. No. 76–782

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[3]The salary of the Vice President was brought within the Act in 1975. Executive Salary Cost-of-Living Adjustment Act, Pub. L. No. 94–82, Section 206, 89 Stat. 423. See S. Rep. No. 94–333, 94th Cong., 1st Sess. 9 (1975).

(D.D.C. July 19, 1977) (three-judge court), aff'd, 434 U.S. 1028 (1978).

The Federal Salary Act contains no provision for annual adjustments to the salaries of officials covered by the Act, including federal judges. Rather, the sole means specified in that Act for modifying such salaries is the quadrennial review process. In 1975, however, Congress enacted the Executive Salary Cost-of-Living Adjustment Act, Pub. L. No. 94–82, 89 Stat. 419. This Act is generally applicable to the offices covered by the Federal Salary Act, including those of the Vice President (3 U.S.C. 104), Cabinet officers and other Executive Schedule officials (5 U.S.C. 5318), members of Congress (2 U.S.C. 31), and federal judges (28 U.S.C. 461).[4] Under the Adjustment Act, such salaries are subject to an annual adjustment equal to the average percentage cost-of-living adjustment made in the General Schedule (GS) pay rates pursuant to the Federal Pay Comparability Act of 1970, 5 U.S.C. 5301, 5305–5308 ("Comparability Act").[5]

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[4] 28 U.S.C. 461 extends to federal judges by virtue of 28 U.S.C. 5 (Supreme Court Justices), 44(d) (Court of Appeals judges), 135 (District Court judges), 173 (Court of Claims judges), 213 (Court of Customs and Patent Appeals judges), and 252 (Customs Court judges). See also 28 U.S.C. 792 (Court of Claims commissioners); 11 U.S.C. 68 (bankruptcy referees). In addition, various non-Article III judges included in the Federal Salary Act are indirectly covered by the Adjustment Act because their salaries are expressly set at the level of district court or court of appeals judges. See 10 U.S.C. 867(a)(1) (Court of Military Appeals judges); 26 U.S.C. 7443(c) (Tax Court judges). See also 28 U.S.C. (and Supp. II) 603 (Director and Deputy Director of the Administrative Office of the United States Courts). Finally, certain categories not covered by the Federal Salary Act, such as District of Columbia judges and some Civil Service employees, are also indirectly affected by the Adjustment Act. See D.C. Code §§ 11–703(b), 11–901 (1973), discussed in *Swain* v. *Pressley*, 430 U.S. 372, 383 n.18 (1977) (District of Columbia judges); note 7, *infra* (Civil Service employees).

[5] Under the Comparability Act, and hence also under the Adjustment Act, cost-of-living adjustments can result in salary decreases as well as

Annual cost-of-living adjustments under the Comparability Act are governed by 5 U.S.C. 5305 (79–983 J.S. App. 27a–31a). The initial step in this process is for the President to designate an appropriate agent to compare the GS rates "with the rates of pay for the same levels of work in private enterprise as determined * * * by the Bureau of Labor Statistics * * *." 5 U.S.C. 5305(a)(1)(A). Following this study, the agent submits to the President a report that makes the above comparison between GS and private salaries and recommends appropriate adjustments in the GS rates of pay. 5 U.S.C. 5305(a)(1).

After considering this report and also the findings and recommendations of the Advisory Committee on Federal Pay (5 U.S.C. 5305(a)(2), 5306), the President may adjust the GS rates in accordance with the principles of comparability contained in 5 U.S.C. 5301(a), in which event he must transmit to Congress a report of the pay adjustment including a determination of the overall percentage adjustment in the General Schedule. 5 U.S.C. 5305(a)(2), (3). However, if, "because of national emergency or economic conditions affecting the general welfare," the President considers it inappropriate to make such an adjustment, he must transmit to Congress an alternative plan setting forth an appropriate adjustment and specifying the overall percentage increase (or decrease) in the GS rates of pay. 5 U.S.C. 5305(c)(1). The President's alternative plan becomes effective "on the first day of the first applicable pay period commencing on or after October 1 of the applicable year," and thereafter remains in effect, unless, within 30

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increases, depending upon economic conditions. However, Congress provided in the Adjustment Act that a salary adjustment not be made "to the extent it would reduce the salary of any individual whose compensation may not, under section 1 of article III of the Constitution of the United States, be diminished during such individual's continuance in office." 28 U.S.C. 461(b) (79–983 J.S. App. 27a).

legislative days as defined in the statute, either House of Congress adopts a resolution disapproving the alternative plan. 5 U.S.C. 5305(c)(2). In that event, the President must again consider the report of his agent and adjust the rates of pay in accordance with the principles of comparability. 5 U.S.C. 5305(c)(2), (m). See *National Treasury Employees Union* v. *Nixon*, 492 F.2d 587 (D.C. Cir. 1974).

In addition to establishing the methodology for determining the amount of an annual cost-of-living adjustment, the Adjustment Act also specifies the effective date of any such adjustment. In particular, the Act provides that a salary adjustment for Article III judges becomes "[e]ffective at the beginning of the first applicable pay period commencing on or after the first day of the month in which an adjustment takes effect under [the Comparability Act] in the rates of pay under the General Schedule * * *" (28 U.S.C. 461(a); 79–983 J.S. App. 26a). Since Article III judges are paid on a monthly basis,[6] their cost-of-living adjustment becomes effective as of the first day of the month in which a GS adjustment takes effect pursuant to the Comparability Act.

2. a. In October 1975, GS salaries were increased by an overall average of 5% pursuant to the Comparability Act, and federal judges and others covered by the Adjustment Act received a like increase. Exec. Order No. 11883, 3 C.F.R. 1024 (1971–1975 Compilation); 11 Weekly Comp. of Pres. Doc. 910 (Aug. 29, 1975). This adjustment raised the annual salary of district judges to $42,000 and of court of appeals judges to $44,600.

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[6] See 5 U.S.C. 5505 and 28 U.S.C. 5, 44(d), 135, 173, 213, and 252; compare 5 U.S.C. 5504, 5541(2)(i). See also affidavit of Joseph A. Leach, filed as an attachment to the Memorandum in Support of Plaintiffs' Motion for Summary Judgment (J.A. 38a).

In October 1976, GS salaries were increased under the Comparability Act by an overall average of 4.8% as recommended by the President's agent for federal pay. Exec. Order No. 11941, 3 C.F.R. 151 (1976 Compilation); 12 Weekly Comp. of Pres. Doc. 1435 (Oct. 1, 1976). On October 1, 1976, however, the President signed the Legislative Branch Appropriation Act of 1977, Pub. L. No. 94-440, 90 Stat. 1439, 1446, 2 U.S.C. 356a (79-983 J.S. App. 31a) ("1976 Pay Act"). The 1976 Pay Act provided that "none of the funds * * * appropriated in this Act or any other Act shall be used to pay the salary [of an individual covered by the Federal Salary Act] * * * at a rate which exceeds the salary rate in effect on September 30, 1976 [except increases pursuant to the four-year review of the Federal Salary Act] * * *" (*ibid.*). Because of this provision, cost-of-living increases that otherwise would have taken effect under the Adjustment Act did not occur for officials within the Federal Salary Act, including the Vice President, Cabinet officers and other Executive Schedule personnel, members of Congress, and federal judges.

b. Less than four months later, in January 1977, the President recommended substantial salary increases for these officials pursuant to the quadrennial review required by the Federal Salary Act. For example, salaries for district judges were increased by 29.8% to $54,500, and salaries for court of appeals judges were increased by 28.9% to $57,500. These increases became effective in March 1977. 42 Fed. Reg. 10297 (1977).

In order "to deal with the anomalous situation of Members of Congress, high level Federal executives, and Federal judges receiving two pay raises in the same calendar year" (H.R. Rep. No. 95-458, 95th Cong., 1st Sess. 2 (1977)), the Federal Comparability Pay Adjustments Act of 1977, Pub. L. No. 95-66, 91 Stat. 270 (79-983 J.S. App.

32a) ("1977 Pay Act"), was enacted on July 11, 1977. The 1977 Pay Act provided that the cost-of-living increases that otherwise would have become effective in October 1977 under the Adjustment Act "shall not take effect" for the Vice President, members of Congress, Cabinet officers and Executive Schedule officials, and federal judges, commissioners and referees. As the House Report explained (H.R. Rep. No. 95–458, *supra*, at 1, 2):

> The sole purpose of [the 1977 Pay Act] is to eliminate the expected October 1977 comparability adjustment for certain individuals in the executive, legislative, and judicial branches whose rates of pay were increased earlier this year pursuant to the recommendations of the Quadrennial Commission.
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> The purpose of the comparability pay system is to insure that pay rates in the Federal service will remain comparable to those in the private sector. Thus, in essence, that system serves much the same purpose as do the recommendations of the Quadrennial Commission. Since those recommendations have now been implemented and the goals of comparability have been achieved, this committee believes it would be inappropriate for persons covered by the Quadrennial Commission's recommendations to receive a comparability increase this October.

In October 1977, GS salaries, which generally had not been affected by the March 1977 increase pursuant to the quadrennial review,[7] were raised by an overall average of

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[7] GS salaries are not subject to the Federal Salary Act. However, under 5 U.S.C. 5308, the lowest level in the Executive Schedule sets a ceiling that cannot be exceeded by any GS salary. See *McCorkle* v. *United States*, 559 F.2d 1258, 1259 (4th Cir. 1977), cert. denied, 434 U.S. 1011 (1978). The March 1977 increase under the Federal Salary Act served to raise this ceiling from $39,600 to $47,500, and thus those GS employees who had reached the previous ceiling benefitted from this increase.

7.1% under the Comparability Act in accordance with the recommendation of the President's agent for federal pay. Exec. Order No. 12010, 3 C.F.R. 142 (1977 Compilation); 13 Weekly Comp. of Pres. Doc. 1436 (Sept. 29, 1977).

c. In October 1978, as recommended in the report of the President's pay agent, GS salaries were increased under the Comparability Act by an overall average of 5.5%. Exec. Order No. 12087, 3 C.F.R. 234 (1978 Compilation); 14 Weekly Comp. of Pres. Doc. 1732 (Oct. 10, 1978). On September 30, 1978, Congress enacted the Legislative Branch Appropriation Act of 1979, Pub. L. No. 95-391, 92 Stat. 763, 788-789 (79-1689 J.S. App. 21a-23a) ("1978 Pay Act"). The 1978 Pay Act provided that "[n]o part of the funds appropriated for the fiscal year ending September 30, 1979 [fiscal year 1979], by this Act or any other Act may be used to pay the salary or pay of any individual in any office or position in the legislative, executive, or judicial branch, or in the government of the District of Columbia, at a rate which exceeds the rate (or maximum rate, if higher) of salary or basic pay payable for such office or position for September 30, 1978 * * * [if the rate of salary exceeds a specified level]" (*id.* at 22a). Because of this provision, cost-of-living increases of 5.5% that otherwise would have taken effect in October 1978 under the Adjustment Act did not occur for a broad range of ranking government officials, including the Vice President, Cabinet officers and other Executive Schedule personnel, members of Congress, and federal judges.

d. For fiscal year 1980, the President's pay agent recommended an average GS cost-of-living adjustment of 10.41% under the Comparability Act. See 15 Weekly Comp. of Pres. Doc. 1530 (Aug. 31, 1979). However, in light of "[i]nflation [which] continues to be the single greatest threat to our economy and * * * a national prob-

lem of foremost concern," the President on August 31, 1979, submitted an alternative plan calling generally for a 7% increase (*ibid.*). The President's alternative plan became effective in October 1979 when neither House of Congress disapproved it within 30 legislative days. See 5 U.S.C. 5305(c)(2) (79–1689 J.S. App. 21a).

Accordingly, on October 1, 1979 (the beginning of the first applicable pay period commencing on or after the first day of the month in which the GS increase for fiscal year 1980 took effect), two adjustments occurred in the salaries of, among others, federal judges. First, the 7% cost-of-living adjustment for fiscal year 1980 based on the President's alternative plan became effective. Second, since the 1978 Pay Act expired by its own terms on September 30, 1979, the 5.5% increase that the Act had superseded during fiscal year 1979 automatically went into effect. Together, these two adjustments resulted in a compounded salary increase of approximately 12.9%.[8]

On October 12, 1979, however, the 1979 Pay Act (Pub. L. No. 96–86, 93 Stat. 656; 79–1689 J.S. App. 23a–26a) was signed into law. The 1979 Pay Act provides that "[f]or the fiscal year 1980, funds available for payment to executive employees, which includes Members of Congress, who under existing law are entitled to approximately 12.9 percent increase in pay, shall not be used to pay any such employee or elected or appointed official any sum in excess of 5.5 percent increase in existing pay * * * " (*id.* at 24a). The Act further provides (*ibid.*):

> That for the purpose of carrying out this provision and notwithstanding the provisions of the Federal

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[8]The final pay schedules for fiscal year 1980 are set forth in Exec. Order No. 12200, 45 Fed. Reg. 16443 (1980), 16 Weekly Comp. of Pres. Doc. 467 (Mar. 12, 1980), superseding Exec. Order No. 12165, 44 Fed. Reg. 58671 (1979), 15 Weekly Comp. of Pres. Doc. 1848 (Oct. 10, 1979).

> Pay Comparability Act of 1970, the Executive Salary Cost-Of-Living Adjustment Act, or any other related provision of law, which would provide an approximate 12.9 percent increase in pay for certain Federal officials for pay periods beginning on or after October 1, 1979, * * * the provisions of [the 1978 Pay Act], which limit the pay for certain Federal offices and positions, shall apply to funds appropriated by this joint resolution or any Act for the fiscal year 1980, except that in applying such limitation the term "at a rate which exceeds by more than 5.5 percent the rate" shall be substituted for the term "at a rate which exceeds the rate" where it appears in subsection (a) of such section for the purpose of limiting pay increases to 5.5 percent.

Because of the 1979 Pay Act, the fiscal year 1980 salary increases of all individuals subject to the 1978 Pay Act, including the Vice President, Cabinet officers and Executive Schedule personnel, members of Congress, and federal judges, were reduced to 5.5% as of October 12, 1979.

3. a. On February 7, 1978, appellees commenced the *Will I* litigation in the United States District Court for the Northern District of Illinois to challenge the 1976 and 1977 Pay Acts.[9] As elaborated in the memorandum in support of their motion for summary judgment, appellees contended in Count I of the amended complaint that the 1976 Pay Act was merely an appropriations measure that refused to provide funds for the 1976 cost-of-living increase but did not modify their substantive entitlement to the increase under the Adjustment Act (79–983 J.S. App. 4a; Memorandum in Support of Plaintiffs' Motion for Summary Judgment, at 25–32). Alternatively, appellees argued that the 1976 Pay Act was unconstitutional under the

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[9]The jurisdiction of the district court was invoked under the Tucker Act, 28 U.S.C. 1346(a)(2) (79–983 J.S. App. 2a).

Compensation Clause insofar as it denied them the 1976 cost-of-living increase (79–983 J.S. App. 4a; Memorandum in Support of Plaintiffs' Motion for Summary Judgment, at 25, 32). In Count II of the amended complaint, appellees asserted that the 1977 Pay Act violated the Compensation Clause by superseding the cost-of-living adjustment scheduled to take effect in October 1977 (79–983 J.S. App. 5a; Memorandum in Support of Plaintiffs Motion for Summary Judgment, at 33–35). Appellees sought a declaration that the failure to pay them the 1976 and 1977 cost-of-living adjustments was unlawful and an injunction requiring the United States to pay them these salary increases (79–983 J.S. App. 1a, 20a–21a).

By order dated March 20, 1979, the district court granted appellees' motion for class certification under Fed. R. Civ. P. 23(b)(2) (J.A. 53a–55a). The Count I class, relating to the 1976 Pay Act, was defined to be all persons who served as Article III judges during part or all of the period between October 1, 1976, when the 1976 cost-of-living adjustment was scheduled to take effect, and March 1, 1977, when a salary increase occurred pursuant to the Federal Salary Act (J.A. 54a–55a). The Count II class, relating to the 1977 Pay Act, consisted of all persons who were appointed Article III judges prior to July 11, 1977 (the date of enactment of the 1977 Pay Act) and held office subsequent to October 1, 1977 (the date on which, but for the 1977 Pay Act, the 1977 cost-of-living adjustment would have become effective for federal judges) (J.A. 55a). The district court's order expressly noted that no judge appointed after July 11, 1977, was a member of either class (*ibid.*).[10]

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[10] The district judge in this case had been appointed to the bench on October 11, 1977, and thus was not a member of either class.

On August 29, 1979, the district court granted appellees' motion for summary judgment (79–983 J.S. App. 1a–19a). The court held that the failure to increase the salaries of federal judges in 1976 and 1977 in accordance with the Adjustment Act constituted a diminution of the judges' compensation and thus violated the Compensation Clause. In reaching this result, the court agreed with appellees that (*id.* at 7a–8a, 14a–15a)

> once the * * * [Adjustment Act,] granting judges "a salary at an annual rate determined under * * * [the Federal Salary Act] as adjusted by Section 461 of this Title," * * * became law [in 1975], the right to an annual adjustment, measured by the average adjustment in the General Schedule, became a part of the judges' [*sic*] compensation which may not be "diminished."
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> The Compensation Clause[ ] * * * [requires] that once the method [for determining judicial compensation] is selected it not be altered to diminish the compensation to which judges are entitled.

Finding that the failure to pay the 1976 and 1977 cost-of-living adjustments represented a direct reduction of the judges' compensation, the court concluded that the 1976 and 1977 Pay Acts were unconstitutional even though they "[did] not discriminate against judges * * * [or] make inroads on their independence" (*id.* at 16a). In addition, as a matter of statutory construction, the court held that neither the 1976 Pay Act nor the 1977 Pay Act modified or repealed the substantive provisions of the Adjustment Act authorizing an annual cost-of-living increase for judges (*id.* at 18a). The court thus entered judgment for appellees for the unspecified amounts of unpaid compensation on both counts of their complaint (*id.* at 20a–21a).

b. On October 19, 1979, appellees commenced the *Will II* litigation in the United States District Court for the Northern District of Illinois. Appellees contended that the 1978 and 1979 Pay Acts were unconstitutional under the Compensation Clause because they deprived Article III judges of the cost-of-living increases authorized in the Adjustment Act. Appellees also asserted that, as a matter of legislative intent, the Pay Acts were only appropriations measures that refused to provide funds for the cost-of-living increases but did not alter the substantive entitlement to the increases pursuant to the Adjustment Act. Finally, appellees argued that the 1979 Pay Act on its face covered only "executive employees, which includes Members of Congress" (79–1689 J.S. App. 24a) and therefore was simply inapplicable to federal judges.

By order dated January 31, 1980, the district court, after certifying two plaintiff-classes, granted appellees' motion for summary judgment (79–1689 J.S. App. 1a–10a).[11] The court held that the 1978 and 1979 Pay Acts violated the Compensation Clause "for the same reasons that identical actions by Congress in 1977 were held unconstitutional" in *Will I* (79–1689 J.S. App. 5a). Based on its view that "subsequent to the 1975 * * * [enactment of the Adjustment Act] the judge's [*sic*] compensation became an annual salary as adjusted by the cost-of-living increase percentage" (*id.* at 6a), the court concluded that

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[11] The two certified plaintiff-classes consisted of all persons who served as Article III judges prior to October 1, 1978, and continued to hold office after that date (the Count I class, concerning the 1978 Pay Act), and all persons who served as Article III judges prior to October 1, 1979, and continued to hold office subsequent to October 12, 1979 (the Count II class, concerning the 1979 Pay Act) (79–1689 J.S. App. 4a). Since the district judge had been appointed to the bench on October 11, 1977 (see note 10, *supra*), he was, in contrast to the situation in *Will I*, a member of both *Will II* classes.

the 1978 and 1979 Pay Acts were invalid under the Compensation Clause as "directly diminishing the compensation provided for by statute for federal judges" (*id.* at 8a). The court also found that the 1978 and 1979 Pay Acts, in failing to appropriate funds for cost-of-living increases, were not intended by Congress to "repeal, suspend, or postpone the operation of the * * * Adjustment Act as it applies to federal judges. * * * [T]he failure to appropriate funds does not defeat a governmental obligation created by statute" (*id.* at 8a, 10a). Finally, with regard to an issue that had not been presented in *Will I*, the court noted that it was "inclined to agree with [appellees'] contention" that the 1979 Pay Act is inapplicable to federal judges because "they are neither 'executive' employees nor 'members of Congress,'" but the court did not consider the question further because of its determination that the Act would be unconstitutional if it did apply to Article III judges (*id.* at 9a). The court thus entered judgment for appellees in the full amount of the unpaid cost-of-living increases due them without regard to the 1978 and 1979 Pay Acts (*id.* at 11a–12a).

SUMMARY OF ARGUMENT

I.

The Court has jurisdiction over these appeals pursuant to 28 U.S.C. 1252. The district court has held unconstitutional several Acts of Congress in civil actions to which the United States is a party. Accordingly, the jurisdictional requirements for an appeal under 28 U.S.C. 1252 are satisfied in these cases.

With respect to the question of disqualification, each of the Justices of this Court is a member of the plaintiff

classes certified pursuant to Fed. R. Civ. P. 23(b)(2) in *Will I* and *Will II*. Similarly, the district judge is a member of the classes in *Will II*. Accordingly, the Justices and the district judge are subject to disqualification under 28 U.S.C. 455(b)(4) and (5)(i), which are applicable to any judge who has "a financial interest in the subject matter in controversy * * * or any other interest that could be substantially affected by the outcome of the proceeding" or "[i]s a party to the proceeding."

Notwithstanding Section 455, however, the district judge and the Justices of this Court are not required to disqualify themselves. Every currently sitting federal judge, whether or not formally a class member, is affected by the district court's statutory rulings that the 1977, 1978, and 1979 Pay Acts were not intended by Congress to supersede or modify the cost-of-living adjustments for Article III judges. Thus, they have a sufficient interest in the outcome of the litigation to be disqualified under 28 U.S.C. 455(b)(4) and (a).

Since all federal judges are therefore covered by Section 455 in these cases, the disqualification issue should be resolved by invoking the "rule of necessity"—that a judge is not disqualified if there is no other judge able to decide the case. This rule ensures that the litigants and the public are not deprived altogether of the judicial processes provided by law. Moreover, there is no indication that the longstanding doctrine of necessity was abrogated by the 1974 revision to Section 455. In light of the settled nature of the rule, the significant public purposes served by the rule, and the constitutional difficulties that the absence of the rule might pose, it should not be presumed that Congress intended by its silence to reject the rule. The courts that have addressed the question are uniformly of the view that Section 455 did not eliminate the rule of necessity.

Accordingly, 28 U.S.C. 455 does not bar the district judge and the Justices of this Court from participating in *Will I* and *Will II*. Furthermore, a decision by this Court is especially appropriate and important in these cases, which present fundamental issues concerning the separation of powers between the Legislative and Judicial Branches and turn on the interpretation of a constitutional provision that the Court has had little occasion to consider. As the forum designated by Congress in 28 U.S.C. 1252, this Court can and should hear the instant appeals.

II.

As a matter of statutory construction, the Pay Acts served to supersede or rescind the annual salary increases authorized for Article III judges by the Adjustment Act. The district court summarily concluded that the Pay Acts were merely funding limitations and were not intended by Congress to modify or repeal the Adjustment Act increases. But "[t]here can be no doubt that Congress could suspend or repeal * * * by an * * * appropriation bill," such as the 1976, 1978, and 1979 Pay Acts, the Adjustment Act's authorization for the cost-of-living increases. *United States* v. *Dickerson*, 310 U.S. 554, 555 (1940). Thus, "[t]he whole question depends on the intention of Congress * * *." *Belknap* v. *United States*, 150 U.S. 588, 594 (1893), quoting *United States* v. *Mitchell*, 109 U.S. 146, 150 (1883).

The language, purpose, and history of the Pay Acts provide ample indication of Congress' intent to enact substantive salary modifications by means of the appropriations measures. The district court therefore erred in attributing to Congress the intent to deny funds for the government's recognized obligations under the Adjustment Act without modifying the basic obligations themselves. Moreover, un-

like the other Acts, the 1977 Pay Act was not an appropriations measure at all, but rather a substantive enactment that unmistakably provided that the October 1977 adjustments "shall not take effect."

In addition, contrary to the views of the district court, the 1979 Pay Act does apply to Article III judges. By its terms, the 1979 Pay Act provides that the 1978 Pay Act, as amended, "shall apply" to fiscal year 1980. Since the 1978 Act expressly extended to the "judicial branch," it is evident that the 1979 Pay Act is also applicable to federal judges. This conclusion is confirmed by the legislative history of the 1979 Act, which explicitly refers to federal judges and is devoid of any suggestion that judges, who had consistently been included in the several preceding Pay Acts, were to be exempted from the 1979 statute.

III.

Assuming the Court finds that Congress intended the Pay Acts to supersede the Adjustment Act increases, these statutes did not violate the Compensation Clause. The 1976, 1977, and 1978 Pay Acts did not diminish the "compensation" of Article III judges because, at the time the statutes were enacted, the annual cost-of-living adjustments had not yet become a part of the judges' salaries.

The district court held that the annual salary adjustments were established as an element of the judges' compensation upon enactment of the Adjustment Act in 1975. But the Adjustment Act itself expressly provides that the annual adjustment for judges takes effect as of the first day of the month in which a GS adjustment goes into effect pursuant to the Comparability Act. Prior to that time, the Adjustment Act increases are not yet effective, and judges, like other officials covered by the Adjustment Act,

have only an expectancy that they will receive the anticipated adjustment, not an entitlement or a vested right to it. Hence, the 1976, 1977, and 1978 Pay Acts, by withholding a *future* increase, did not diminish the judges' compensation.

This result is consistent with the history of the Compensation Clause. The Founding Fathers deliberately empowered Congress to raise, or to refuse to raise, the salaries of federal judges, notwithstanding concerns about the effect of such congressional power on judicial independence. There is no meaningful difference between the authority of Congress, recognized by the Framers of the Constitution, to consider but refuse to enact salary increases for Article III judges and its analogous authority to rescind an increase that has not yet gone into effect.

Finally, the district court's holding—that future increases under the Adjustment Act are part of a judge's compensation protected by the Compensation Clause—would unduly limit the constitutional province of Congress. Under the decisions below, Congress would be forever prevented from modifying the law in any manner that would afford sitting Article III judges a lesser salary than they would receive pursuant to the Adjustment Act. The Adjustment Act and the Compensation Clause cannot sensibly be read to provide a perpetual guarantee that judges will continue to receive not only their present salaries but also the annual cost-of-living adjustment, and thus permanently to freeze into law, as a matter of constitutional doctrine, the Adjustment Act plan that Congress adopted only five years ago.

Accordingly, the Compensation Clause does not preclude Congress from acting to supersede a scheduled adjustment before the cost-of-living increase takes effect. Therefore, the 1976, 1977, and 1978 Pay Acts, in failing to

allow the expected increases to occur, did not constitute a diminishment of compensation within the meaning of the Compensation Clause.

IV.

Even if the Pay Acts resulted in a diminution of judges' salaries, they were within the constitutional power of Congress. The Compensation Clause is not violated by a statute that, like the Pay Acts, does not discriminate against Article III judges or "make[ ] inroads upon the independence of judges" (*O'Malley* v. *Woodrough*, 307 U.S. 277, 282 (1939)). This interpretation comports with the well-established purpose of the Compensation Clause "to promote the public weal by giving [judges] that independence which makes for an impartial and courageous discharge of the judicial function" (*Evans* v. *Gore*, 253 U.S. 245, 248 (1920)). Just as Article III judges "are also citizens * * * [subject to] the common duties of citizenship" (*O'Malley* v. *Woodrough*, *supra*, 307 U.S. at 282), so, too, are they high-ranking public officeholders who should not be exempted from the responsibilities and obligations reasonably imposed on all other leading government officials in the Pay Acts. In light of the object of the Compensation Clause and the decisions of this Court, the Constitution does not preclude Congress from including federal judges in such legitimate, nondiscriminatory legislation.

Nor is this analysis avoided by labeling the Pay Acts as "direct" rather than "indirect" diminutions in compensation. The Compensation Clause should be construed in "view of the scope of protection needed to maintain an independent judiciary" (*Atkins* v. *United States*, 556 F.2d 1028, 1045 (Ct. Cl. 1977), cert. denied, 434 U.S. 1009 (1978)), and this remains the guiding principle irrespective of the nature of the alleged diminishment. The district

court, by holding all "direct" diminutions to be unconstitutional without regard to considerations of judicial independence, has divorced the Compensation Clause from its original intendment and has ignored the sound admonition that "a mere exegesis of words is not to be preferred to an interpretation of the Clause in light of its widely acknowledged purpose" (556 F.2d at 1049). Under the Compensation Clause, the same standard, predicated upon the principle of judicial independence, is applicable to "direct" and "indirect" diminutions.

ARGUMENT

I. THE COURT HAS JURISDICTION OVER THE PRESENT APPEALS

In its orders of February 19, 1980 (J.A. 56a), and June 16, 1980 (J.A. 76a), the Court postponed the question of jurisdiction in these cases to the hearing on the merits. See also Rule 16(6) of the Rules of this Court. In addition, the Court in *Will I* has directed the parties "to address the effect of 28 U.S.C. § 455 on the jurisdiction of the District Court and on the jurisdiction of this Court" (J.A. 56a). We submit that the Court has jurisdiction over these appeals pursuant to 28 U.S.C. 1252 and that, in view of the "rule of necessity," neither the district judge nor the Justices of this Court are disqualified from participating in the disposition of these cases by virtue of 28 U.S.C. 455 (App., *infra*, 1a–3a).

A. The Jurisdictional Requirements For An Appeal Under 28 U.S.C. 1252 Are Satisfied In These Cases

The Court has jurisdiction in these cases under 28 U.S.C. 1252. That statute authorizes any party to appeal to this Court "from an interlocutory or final judgment, de-

cree or order of any court of the United States * * * holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States * * * is a party."

These requirements plainly are satisfied here. The final judgments of the district court, in invalidating the Pay Acts, held unconstitutional several Acts of Congress (79–983 J.S. App. 7a, 16a, 20a–21a; 79–1689 J.S. App. 5a, 7a, 11a–12a). The judgments were rendered in civil actions to which the United States is clearly a party. Hence, this Court has jurisdiction over these appeals pursuant to Section 1252. See *McLucas* v. *DeChamplain*, 421 U.S. 21, 30–31 (1975).

B. Under The "Rule Of Necessity," Neither The District Judge Nor The Justices Of This Court Are Disqualified From Participating In The Disposition Of These Cases By Virtue Of 28 U.S.C. 455

The strictures imposed by the judicial disqualification statute, 28 U.S.C. 455, are not jurisdictional in nature and do not deprive this Court of the jurisdiction established by 28 U.S.C. 1252. Section 455 provides only that a judge "shall disqualify himself" in certain specified situations (App., *infra*, 1a), and nothing in its text or legislative history suggests in any way that it goes beyond the personal disqualification of the individual judge or affects the jurisdiction conferred upon the federal courts by statute.[12]

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[12] In their motions to affirm (79–983 Motion to Affirm 1; 79–1689 Motion to Affirm 1–2), appellees agreed that 28 U.S.C. 455 neither disqualifies the Justices of this Court from participating in the disposition of these cases nor affects the jurisdiction of the Court to hear these appeals.

With respect to the question of disqualification, each of the Justices of this Court is a member of the plaintiff classes certified by the district court in both cases pursuant to Fed. R. Civ. P. 23(b)(2) (see page 14 and page 16 note 11, *supra*).[13] In addition, as previously noted (see page 14 note 10 and page 16 note 11, *supra*), the district judge in these cases is a member of the classes in *Will II* but not in *Will I*. Accordingly, the Justices, as class members in *Will I* and *Will II*, and the district judge, as a class member in *Will II*, would appear to fall within the provisions of 28 U.S.C. 455(b)(4) and (5)(i) (App., *infra*, 1a) that disqualify any judge who has "a financial interest in the subject matter in controversy * * * or any other interest that could be substantially affected by the outcome of the proceeding"[14] or "[i]s a party to the proceed-

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[13] We note that a class member cannot opt out of a class certified under Fed. R. Civ. P. 23(b)(2). See 3B *Moore's Federal Practice* ¶¶ 23.31[3], at 23-262, and 23.60, at 23-466 (2d ed. 1980); 7A C. Wright & A. Miller, *Federal Practice and Procedure: Civil* §§ 1775, at 31, and 1787, at 155 (1972); *id.* §§ 1775, at 27-28, and 1787, at 124 (1979 Supp.).

[14] "Financial interest" is defined in pertinent part (28 U.S.C. 455(d)(4); App., *infra*, 2a) as "ownership of a legal or equitable interest, however small * * *." The statutory provision concerning "any other interest that could be substantially affected by the outcome of the proceeding" (28 U.S.C. 455(b)(4); App., *infra*, 1a) was intended principally to apply to economic interests that are not encompassed within the definition of "financial interest." See, *e.g.*, *In re New Mexico Natural Gas Antitrust Litigation*, Nos. 80-1343, 80-1317 (10th Cir. May 5, 1980), slip op. 4; *In re Virginia Electric & Power Co.*, 539 F.2d 357, 367-368 (4th Cir. 1976); 13 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure: Civil* § 3547, at 366-367 (1975). See also *Hearings on S. 1064 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 95, 97, 101, 103 (1973) (statement of Professor E. Wayne Thode); E. Thode, *Reporter's Notes to Code of Judicial Conduct* 63, 66, 69, 70 (1973).

With regard to the Code of Judicial Conduct of the American Bar Association, we note that, in substantially revising 28 U.S.C. 455 in 1974, Congress intended to make "the statutory grounds for disqualifi-

ing."[15] Moreover, every currently sitting federal judge, whether or not formally a class member, is affected by the district court's statutory rulings (see pages 15, 17, *supra*, and pages 32–50, *infra*) that the 1977, 1978, and 1979 Pay Acts were not intended by Congress to supersede or modify the cost-of-living adjustments for Article III judges, and thus they would seem to have a sufficient interest in the outcome of the litigation to be disqualified under 28 U.S.C. 455(b)(4) and (a) (App., *infra*, 1a). See also *Evans* v. *Gore*, 253 U.S. 245, 247–248 (1920); *Atkins* v. *United States*, 556 F.2d 1028, 1035–1040 (Ct. Cl. 1977), cert. denied, 434 U.S. 1009 (1978).

Notwithstanding the applicability of 28 U.S.C. 455, however, we believe that the district judge and the Justices of this Court are not required to disqualify themselves in these cases. In our view, the disqualification

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cation of a judge in a particular case conform generally with the recently adopted canon of the Code of Judicial Conduct which relates to disqualification of judges for bias, prejudice, or conflict of interest." S. Rep. No. 93-419, 93d Cong., 1st Sess. 1 (1973); H.R. Rep. No. 93-1453, 93d Cong., 2d Sess. 1-2 (1974). Accordingly, interpretations of the Code serve to illuminate the proper construction of Section 455. Provisions analogous to 28 U.S.C. 455 are contained in Canon 3(C) of the Code of Judicial Conduct, which has been adopted for federal judges by the Judicial Conference of the United States. See 69 F.R.D. 273 (1975); 73 F.R.D. 247, 254-255 (1977); H.R. Rep. No. 93-1453, *supra*, at 10-12.

[15] The Justices of this Court and the district judge are also subject to disqualification under 28 U.S.C. 455(a), which provides that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned" (App., *infra*, 1a).

In line with the rationale of such decisions as *Evans* v. *Gore*, 253 U.S. 245, 247-248 (1920), and in light of the congressional intention to "broaden * * * the grounds for judicial disqualification" (S. Rep. No. 93-419, *supra*, at 1; H.R. Rep. No. 93-1453, *supra*, at 1-2), we construe Section 455(a) and (b) to apply to judges' financial or other interests arising out of their position as federal judges (including, as relevant here, their economic interest in their salary) and not to be limited to outside interests that are independent of their service in the judiciary.

issue should be resolved by invoking the "rule of necessity"—that a judge is not disqualified if there is no other judge able to decide the case. This rule ensures that the litigants and the public are not deprived altogether of the judicial processes provided by law. See, *e.g.*, *Evans* v. *Gore*, *supra*, 253 U.S. at 247–248; *Brinkley* v. *Hassig*, 83 F.2d 351, 357 (10th Cir. 1936); cf. *FTC* v. *Cement Institute*, 333 U.S. 683, 701 (1948). Additionally, a decision by this Court is especially appropriate and important in the instant cases, which present fundamental issues concerning the separation of powers between the Legislative and Judicial Branches and turn on the interpretation of a constitutional provision that the Court has had little occasion to consider.[16]

We also believe that Section 455 does not abrogate the "rule of necessity." The doctrine of necessity has been traced back to at least 1430 in England (see *Atkins* v. *United States*, *supra*, 556 F.2d at 1036) and, at the time Section 455 was amended in 1974, it had long been consis-

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[16] Of course, if all of the Justices of this Court are disqualified, there would be no quorum available to hear these appeals. See 28 U.S.C. 1. In the event that a direct appeal to this Court cannot be heard and determined because of the absence of a quorum of qualified Justices, 28 U.S.C. 2109 (79-983 J.S. App. 32a-33a) and 28 U.S.C. 291 *et seq.* provide that the Chief Justice may remit the case to the court of appeals for the appropriate circuit to render a final and conclusive decision. See also *Meeropol* v. *Nizer*, 429 U.S. 1337, 1339 (1977) (Marshall, Circuit Justice). However, the great majority of federal judges are members of one or more of the classes in these cases and thus would be disqualified; indeed, only one judge of the United States Court of Appeals for the Seventh Circuit is not a class member in *Will I*, and all Seventh Circuit judges are class members in *Will II* (there is currently one vacancy on the Seventh Circuit). Furthermore, while there may be judges from other circuits and from the district courts who are not class members in either case, every currently sitting federal judge is, as discussed in the text, affected by the district court's statutory decisions in these cases. Hence, all federal judges would be disqualified from participating in these appeals, and therefore the procedure established by 28 U.S.C. 2109 is unavailable.

tently adhered to by the federal and state courts in the United States (see, *e.g.*, 2 K. Davis, *Administrative Law Treatise* § 12.04 (1958); Frank, *Disqualification of Judges*, 56 Yale L.J. 605, 611 (1947)), including expressly by this Court in *Evans* v. *Gore*, *supra*, and implicitly in *Miles* v. *Graham*, 268 U.S. 501 (1925), and *O'Malley* v. *Woodrough*, 307 U.S. 277 (1939).[17] As the Court has recently observed, "[i]t is always appropriate to assume that our elected representatives, like other citizens, know the law." *Cannon* v. *University of Chicago*, 441 U.S. 677, 696–697 (1979). Likewise, it is also appropriate to assume that Congress does not intend to alter settled principles unless its intent to do so is clearly expressed. See, *e.g.*, *Owen* v. *City of Independence, Missouri*, No. 78–1779 (Apr. 16, 1980), slip op. 14–15; *Gooding* v. *United States*, 416 U.S. 430, 457–458 (1974); *Callanan* v. *United States*, 364 U.S. 587, 594 (1961); *Robertson* v. *Railroad Labor Board*, 268 U.S. 619, 627 (1925). These canons of construction are particularly well-founded in this instance, in light of the significant public purposes served by the rule of necessity and the constitutional difficulties that might be raised if every federal judge were rendered ineligible to sit in these cases.

Here, neither the language nor the legislative history of Section 455 contains any indication whatever that Congress intended to repudiate the rule of necessity. On the contrary, statements in the committee reports and hearings expressly indicate that Section 455 was designed merely to establish objective criteria for selecting which among many qualified judges should preside over a law-

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[17] See also *North American Co.* v. *SEC*, 327 U.S. 686 (1946), discussed in Frank, *Disqualification of Judges: In Support of the Bayh Bill*, 35 Law & Contemp. Prob. 43, 44 (1970) (Chief Justice Stone withdrew his disqualification in order to provide a quorum on the Court).

suit; there is no evidence of an intention to abrogate the rule designed to cover the unique situation where all federal judges may technically be disqualified. Indeed, the statute's list of disqualifying factors was made exceedingly broad, and the allowable waivers from its terms were narrowly limited, because of the general understanding that other judges not subject to a disqualifying connection with the parties or issues in litigation would be available to hear the case. Thus, in explaining the expansive language of Section 455(a), which provides that a judge should recuse himself in any proceeding in which "his impartiality might reasonably be questioned," the House and Senate Reports stated:

> This general standard is designed to promote public confidence in the impartiality of the judicial process by saying, in effect, if there is a reasonable factual basis for doubting the judge's impartiality, *he should disqualify himself and let another judge preside over the case.*

S. Rep. No. 93-419, 93d Cong., 1st Sess. 5 (1973) (emphasis added); H.R. Rep. No. 93-1453, 93d Cong., 2d Sess. 5 (1974) (emphasis added). Similarly, these reports observed that the parties should not be permitted to waive a judicial disqualification under Section 455(b) because

> the committee believes that confidence in the impartiality of federal judges is enhanced by a more strict treatment of waiver. There are approximately 667 federal judges, active and retired. *The statutes contain ample authority for chief judges to assign other judges to replace either a circuit or district court judge who becomes disqualified.*

S. Rep. No. 93-419, *supra*, at 7 (emphasis added); H.R. Rep. No. 93-1453, *supra*, at 7 (emphasis added). Numerous statements in the congressional hearings also express the same understanding that disqualification under Section

455 would simply result in the assignment of a different judge to hear the case.[18]

Thus, nothing in the text or legislative history of Section 455 suggests a congressional intent to reject the rule of necessity.[19] Moreover, no reason is evident why Congress would have intended to supplant this longstanding doctrine. The principal objective of Section 455 was to promote public confidence in the judicial system. That goal is not materially advanced, and in fact may be materially impaired, by effectively depriving certain litigants and the public at large of a judicial forum for the resolution of important legal issues.[20]

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[18] See *Hearings on S. 1064 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. (1971, 1973), at 15 (statement of Sen. Burdick); *ibid.* (statement of Sen. Bayh); 16 (statement of Sen. Bayh); 19 (statement of Sen. Gurney); 26 (statement of Sen. Hollings); 33 (statement of Mr. John P. Frank); 41 (statement of Mr. Frank); 50 (statement of Chief Counsel William P. Westphal); 61 (statement of Mr. Frank); 74 (statement of Sen. Burdick); 77 (statement of Sen. Hollings); 91 (statement of Mr. Westphal); 108–109 (statement of Professor E. Wayne Thode); 114 (statement of Mr. Frank); 118–119 (statement of Mr. Frank). See also *id.* at 189 (letter of May 26, 1964, from Professor Edmond Cahn to Hon. William J. Brennan, Jr.) ("[Section 455 contains a categorical disqualification standard] that I believe the justices would have to disregard in any one of the many situations exemplified by *Evans* v. *Gore*, 253 U.S. 245 * * *").

In addition, the attention of the Congress was repeatedly directed to the practical problems of disqualification in jurisdictions containing only a single district judge. See *Hearings*, *supra*, at, *e.g.*, 18–19, 21, 30, 40, 42–43, 84, 90–91, 117. In the end, Congress concluded that these difficulties did not constitute a substantial objection to Section 455. Nowhere in the course of its consideration, however, did Congress signify an intent to create a potentially far more serious problem by eliminating the rule of necessity.

[19] The legislative history of prior judicial disqualification statutes (see 36 Stat. 1090; 62 Stat. 908) also does not suggest any congressional intention to abandon the rule.

[20] We also note that the Advisory Committee on Judicial Activities, appointed by the Chief Justice to give advisory opinions to federal

Finally, the courts that have addressed the question are uniformly of the view that Section 455, as amended in 1974, did not eliminate the rule of necessity. See *Duplantier* v. *United States*, 606 F.2d 654, 662–663 (5th Cir. 1979), petition for cert. pending on other grounds, No. 79–1180 (filed Jan. 31, 1980); *Atkins* v. *United States*, *supra*, 556 F.2d at 1039–1040;[21] *Pilla* v. *American Bar Association*, 542 F.2d 56, 58–59 (8th Cir. 1976); *Foley* v. *Carter*, Civ. No. 79–3063 (D.D.C. Mar. 24, 1980), slip op. 2, appeal pending, Nos. 80–1548, 80–1551 (D.C. Cir. filed May 21, 1980); *United States* v. *Corrigan*, 401 F. Supp. 795, 798 (D. Wyo. 1975).[22]

Accordingly, Section 455 does not bar the district judge and the Justices of this Court from participating in these cases. As the forum designated by Congress in 28 U.S.C. 1252, this Court can and should hear the present appeals.

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judges on the Code of Judicial Conduct, has observed that, in addressing disqualification questions, it is a "major consideration of all concerned * * * that the courts must operate * * *." Advisory Opinion No. 26 (Jan. 22, 1973). See also Advisory Opinion No. 45 (Feb. 24, 1975); Advisory Opinion No. 52 (Aug. 15, 1977); Advisory Opinion No. 62 (undated), discussing unpublished letter opinion Doc. 78. These interpretations provide guidance on the meaning of Section 455 since, as discussed above (see pages 25–26, note 14, *supra*), Congress intended the statutory grounds for disqualification to conform with the provisions of the Code.

[21] In *Atkins*, the disqualification question was initially certified to this Court, but, after both parties agreed that the judges of the Court of Claims were not disqualified, the Court dismissed the certificate. *Atkins* v. *United States*, 426 U.S. 944 (1976).

[22] A similar result has been reached with respect to state judges under state rules of disqualification. See *Olson* v. *Cory*, 26 Cal. 3d 672, 609 P.2d 991, 997, 164 Cal. Rptr. 217, 223 (1980); *Nellius* v. *Stiftel*, 402 A.2d 359 (Del. Sup. Ct. 1978); *Dacey* v. *Connecticut Bar Association*, 170 Conn. 520, 368 A.2d 125, 128–129 (1976); *Schwab* v. *Ariyoshi*, 57 Haw. 348, 555 P.2d 1329 (1976); cf. *Dacey* v. *Dorsey*, 568 F.2d 275, 277 (2d Cir.), cert. denied, 436 U.S. 906 (1978); *Bonner* v. *Wyrick*, 563 F.2d 1293, 1296 n.3 (8th Cir. 1977), cert. denied, 439 U.S. 913 (1978).

II. AS A MATTER OF STATUTORY CONSTRUCTION, THE PAY ACTS SERVED TO SUPERSEDE OR RESCIND THE ANNUAL SALARY INCREASES AUTHORIZED FOR ARTICLE III JUDGES BY THE ADJUSTMENT ACT

Although the district court in both cases invalidated the Pay Acts on constitutional grounds, it also held that, as a matter of statutory construction, none of the Acts was intended by Congress to supersede or rescind the annual Adjustment Act increase authorized for Article III judges. Because affirmance of the district court's judgments on this statutory ground would obviate the need for the Court to consider the constitutional issues presented, we address ourselves at the outset to the statutory questions.[23]

A. The Pay Acts Were Intended Substantively To Supersede The Provisions Of The Adjustment Act

In a single paragraph at the end of its opinion in *Will I*, the district court ruled (79-983 J.S. App. 18a) that neither the 1976 nor the 1977 Pay Act "contains language which expressly or impliedly indicates that Congress was modifying or repealing the provisions of the Adjustment Act." Without examining the purpose or legislative history of the statutes, the court concluded (*ibid.*) that the 1976 Pay Act did not alter the substantive terms of the Adjustment

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[23] A direct appeal pursuant to 28 U.S.C. 1252 "brings before [the Court], not only the constitutional question, but the whole case * * *." *McLucas* v. *DeChamplain*, 421 U.S. 21, 31-32 (1975). See also *United States* v. *Raines*, 362 U.S. 17, 20, 27 n.7 (1960); *United States* v. *Rock Royal Co-operative, Inc.*, 307 U.S. 533, 541 (1939). Thus, as appellees agree (79-983 Motion to Affirm 1, 14 n.10; 79-1689 Motion to Affirm 1, 13), the statutory issue is properly presented here and should be resolved before the Court turns to the constitutional questions involved in this case. See *City of Mobile, Alabama* v. *Bolden*, No. 77-1844 (Apr. 22, 1980), slip op. 3; *United States* v. *Clark*, No. 78-1513 (Feb. 26, 1980), slip op. 4-5; *Fusari* v. *Steinberg*, 419 U.S. 379, 387-388 n.13 (1975).

Act, but instead was merely an appropriations measure that refused to fund the 1976 Adjustment Act increases. The court did not separately consider the 1977 Pay Act (which was not an appropriation statute) but nonetheless concluded (*ibid.*) that this Act also did not modify or repeal the provisions of the Adjustment Act. Similarly, the court in *Will II*, relying on its *Will I* decision, found (79-1689 J.S. App. 8a, 10a) that the 1978 and 1979 Pay Acts were also appropriations measures that simply failed to finance the cost-of-living increases but did not substantively modify the salary levels under the Adjustment Act.[24]

In our view, the district court erred in construing the Pay Acts in this manner. "There can be no doubt that Congress could suspend or repeal* * * by an * * * appropriation bill" the Adjustment Act's authorization for the cost-of-living increases. *United States* v. *Dickerson*, 310 U.S. 554, 555 (1940), and cases cited therein. See also *Zbaraz* v. *Quern*, 596 F.2d 196, 200-202 (7th Cir. 1979), appeals pending, Nos. 79-4, 79-5, 79-491 (argued Apr. 21, 1980); *Preterm, Inc.* v. *Dukakis*, 591 F.2d 121, 133-134

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[24] We note that under the district court's interpretation that the Pay Acts did not substantively supersede the cost-of-living increases, claims for salary adjustments might be asserted by a great many officials whose salaries are affected by the Adjustment Act, including members of Congress, Cabinet officers and Executive Schedule personnel, Civil Service employees paid at the statutory ceiling, and other positions that are directly or indirectly subject to the provisions of the Adjustment Act (see page 6 and note 4, page 10 note 7, *supra*). Indeed, because, under the district court's construction, the 1977, 1978, and 1979 cost-of-living increases would be part of the base salary for subsequent years, such claims would not be limited to the particular fiscal year covered by each Pay Act but instead would continue in succeeding years (and be compounded) until the next quadrennial increase under the Federal Salary Act takes effect (currently scheduled for 1981). For this reason, recently appointed Article III judges who are not members of the classes in these cases may also be entitled to seek higher salaries based on the district court's statutory rulings (see page 26, *supra*).

(1st Cir.), cert. denied, 441 U.S. 952 (1979); *Director, Office of Workers' Compensation Programs* v. *Eastern Coal Corp.*, 561 F.2d 632, 650-651 (6th Cir. 1977); *Director, Office of Workmen's Compensation Program* v. *Alabama By-Products Corp.*, 560 F.2d 710, 719 (5th Cir. 1977); *City of Los Angeles* v. *Adams*, 556 F.2d 40, 48-49 (D.C. Cir. 1977); *Director, Office of Workers' Compensation Programs* v. *National Mines Corp.*, 554 F.2d 1267 (4th Cir. 1977). Accordingly, the only issue is whether Congress expressed with sufficient clarity its intention to enact substantive salary modifications by means of an appropriations act. See *United States* v. *Dickerson, supra*, 310 U.S. at 556, 561-562. See also *TVA* v. *Hill*, 437 U.S. 153, 189-191 (1978).[25] "'The whole question depends on the inten-

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[25]The instant cases differ from *TVA* v. *Hill* in several significant regards. In *Hill*, the Court rejected the argument that appropriations to complete the Tellico Dam Project had implicitly repealed the provisions of the Endangered Species Act that operated to prohibit further construction. In contrast to *Hill*, the underlying statute here—the Adjustment Act—established government obligations that, unless superseded by Congress, could be enforced in court, and it is simply not plausible to believe that Congress intended only to withhold funds while leaving the substantive obligations outstanding. Moreover, unlike in *Hill* (437 U.S. at 190), this case does not truly involve a repeal by implication, because there is at best a minor distinction between substantive and appropriations legislation in the context of expenditures for federal salaries. In addition, the appropriations in *Hill* "represented relatively minor components of the lump-sum amounts for the *entire* TVA budget" (*id.* at 189; emphasis in original), and in fact the acts "did not themselves identify the projects for which the sums had been appropriated" (*id.* at 189 n.35). Here, in contrast, it was unmistakable that the Pay Acts applied to salary increases under the Adjustment Act, and the legislative histories of the Pay Acts demonstrate that they were so understood; indeed, the very specificity of the provisions of the Pay Acts suggests that Congress considered and intended their particular consequences. Finally, as discussed below, the congressional intent to supersede the Adjustment Act increases was "clear and manifest" (*id.* at 189, quoting *Posadas* v. *National City Bank*, 296 U.S. 497, 503 (1936)), and there was an "affirmative showing of an intention to repeal" the Adjustment Act authorization for

tion of Congress as expressed in the statutes.'" *Belknap* v. *United States*, 150 U.S. 588, 594 (1893), quoting *United States* v. *Mitchell*, 109 U.S. 146, 150 (1883). Compare *Andrus* v. *Sierra Club*, 442 U.S. 347, 359–361 (1979).[26] We submit that the language, purpose, and history of the Pay Acts provide ample indication of Congress' intent substantively to supersede the Adjustment Act increases for fiscal years 1977–1980; indeed, as discussed below, a contrary construction of the Pay Acts merely to withhold funding for salary adjustments would defeat the very objectives expressly advanced by Congress in support of the statutes.

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such increases (437 U.S. at 190, quoting *Morton* v. *Mancari*, 417 U.S. 535, 550 (1974)). See also *Zbaraz* v. *Quern*, *supra*, 596 F.2d at 201; *Preterm, Inc.* v. *Dukakis*, *supra*, 591 F.2d at 133–134.

[26] As the court of appeals explained in *City of Los Angeles* v. *Adams*, *supra*, 556 F.2d at 48–49 (footnotes omitted):

> According to its own rules, Congress is not supposed to use appropriations measures as vehicles for the amendment of general laws, including revision of expenditure authorization. In general, the doctrine disfavoring repeals by implications is said to apply "with full vigor" when the subsequent law is an appropriations measure. When Congress chooses to do so, however, we are bound to follow Congress's last word on the matter even in an appropriations law.

See also *Preterm, Inc.* v. *Dukakis*, *supra*, 591 F.2d at 134 ("Indeed, were these expressions of Congressional intent held to be insufficient in quantity or quality to legislate substantively, we would in candor be forced to admit that legislation in appropriations acts was, as a practical matter, out of the question. Such a determination, regardless of our view of the wisdom of the course chosen by the legislature, is clearly beyond the proper scope of this court").

We also note that the Congressional Research Service has concluded, with specific reference to the 1979 Pay Act, that Congress can legislate in an appropriations measure to determine salary levels notwithstanding the Adjustment Act's authorization for cost-of-living increases. See *Diminution of Judicial Salaries—A Consideration of the Constitutional Issue Raised by the Action of Congress With Respect to Judicial Salaries*, reprinted in 125 Cong. Rec. S16706, S16708–S16709 (daily ed. Nov. 15, 1979).

Moreover, the interpretation of the Pay Acts advocated by appellees (79-983 Motion to Affirm 14-21; 79-1689 Motion to Affirm 13-19) and adopted by the court below (79-983 J.S. App. 18a; 79-1689 J.S. App. 8a, 10a) is that Congress purposefully refused to pay the full salaries that, arguendo, it recognized were required by law. It should not lightly be presumed, however, that, at least in the absence of exceptional circumstances, Congress would act to deny funds to satisfy the government's conceded, lawful obligations under the Adjustment Act. "[I]t is not to be believed that Congress during all these years was simply appropriating a part of that which it knew was due to [federal judges and other officials]." *Belknap* v. *United States*, *supra*, 150 U.S. at 595. Rather, the more likely inference is that Congress intended to supersede the provisions of the Adjustment Act in order to modify the basic obligations themselves.[27]

1. The legislative history of the 1976 Pay Act clearly establishes that Congress intended to bar the 1976 Adjustment Act increases. The 1976 Pay Act, which was introduced on the floor of the House as an amendment to the

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[27] Appellees rely (79-983 Motion to Affirm 19) on the contention that the 1979 Pay Act, which is discussed in detail below (see pages 46-50, *infra*), was enacted by Congress in part to deny appropriations for cost-of-living adjustments that had already taken effect. However, the 1979 Pay Act involved a highly unusual situation in which, because of controversies concerning pay raises for members of Congress and Medicaid funding for abortions, Congress was unable to pass the Pay Act before the salary increases for fiscal year 1980 had become effective. In this unprecedented instance, Congress declined to appropriate funds to pay the full increases for the intervening period (which did not exceed 11 days for any pay schedule). No issue is presented in these appeals concerning this brief interim period, and we do not believe that the unusual events surrounding passage of the 1979 Pay Act, understood in context, detract in any way from the general proposition that an appropriations act should not ordinarily be presumed merely to withhold funds necessary to meet a recognized legal obligation.

Legislative Branch Appropriation Act of 1977 (122 Cong. Rec. 28861, 28872 (1976)), was part of the congressional effort to be held accountable "on [the] public record" when salaries are increased for top government officers (*id.* at 28872 (remarks of Rep. Shipley)) and to "strike a real blow for economy in Government" (*id.* at 28876 (remarks of Rep. Udall)). In introducing the provision, Representative Shipley, the chairman of the subcommittee, explained that the "amendment prevents the automatic cost-of-living pay increase * * * during the fiscal year ending September 30, 1977" (*id.* at 28872).[28] See also *id.* at 28862 (remarks of Rep. Shipley) ("My amendment is very simple. No [one]* * * will receive any increase in salary with regard to the cost-of-living increase"). This understanding—that the provision prohibited the cost-of-living adjustments—was repeatedly recognized in the floor debate on the Shipley Amendment.[29] Moreover, despite Representative

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[28] As originally proposed, the Shipley Amendment applied only to salary increases for members of the House of Representatives. However, the provision was later expanded to include all persons covered by the Federal Salary Act. See 122 Cong. Rec. 28877 (1976) (remarks of Rep. Udall). Although the Senate Committee on Appropriations initially recommended that this provision be deleted altogether (see S. Rep. No. 94-1201, 94th Cong., 2d Sess. 2 (1976)), the bill passed by the Senate included the provision but limited it to members of Congress. See 122 Cong. Rec. 29132 (1976) (remarks of Sen. Taft); *id.* at 29133, 29171, 29377. In the end, the Conference Committee accepted the House version that extended the 1976 Pay Act to all positions covered by the Federal Salary Act. See H.R. Conf. Rep. No. 94-1559, 94th Cong., 2d Sess. 3 (1976); 122 Cong. Rec. 31859 (1976) (remarks of Sen. Hollings).

[29] See, *e.g.*, 122 Cong. Rec. 28863 (1976) (remarks of Rep. Coughlin, the ranking minority member of the subcommittee) ("terminating the automatic cost-of-living increases * * * for this October"); *id.* at 28865 (remarks of Rep. Armstrong) ("preclude a cost-of-living increase * * * during the current fiscal year * * * [a] freeze of the salaries"); *ibid.* (remarks of Rep. Yates) ("freeze of the salaries"); *ibid.* (remarks of Rep. McClory) ("effectively eliminate the present cost-of-living increases"); *id.* at 28866 (remarks of Rep. Evans of Colorado) ("limita-

Wirth's explicit objection that it was inappropriate to enact substantive legislation in an appropriations bill (*id.* at 28865), the provision was overwhelmingly adopted by the House (*id.* at 28881, 28886–28887). And, in the course of agreeing to the Conference Report, the House debates again made clear that the 1976 Pay Act prohibited the cost-of-living increases scheduled to take effect in October 1976 under the Adjustment Act.[30]

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tion or reduction of * * * salaries"); *id.* at 28870 (remarks of Rep. Derwinski) ("freezing * * * pay at its current level"); *id.* at 28871 (remarks of Rep. Miller of Ohio) ("stopping the pay raise"); *ibid.* (remarks of Rep. Jeffords) ("delaying the cost-of-living increase [until the Quadrennial Review]"); *id.* at 28872 (remarks of Rep. Shipley) ("this amendment would * * * bar * * * cost-of-living increases * * * under [the Adjustment Act]"); *ibid.* (remarks of Rep. Armstrong) ("freeze the salary for the time being"); *id.* at 28874 (remarks of Rep. Grassley) ("[i]n times like these of the big budget deficit and the high inflation, we had better say 'no' [to the automatic cost-of-living increases]"); *ibid.* (remarks of Rep. Giaimo) ("turn down a [cost-of-living] increase"); *id.* at 28875 (remarks of Rep. Seiberling) ("would deny * * * a * * * cost-of-living increase"); *id.* at 28876 (remarks of Rep. Udall) ("there is not going to be a cost-of-living increase for [individuals covered by the Federal Salary Act]"); *id.* at 28877 (remarks of Rep. Bauman) ("would have the effect of prohibiting salary increases"); *id.* at 28878 (remarks of Rep. Smith of Nebraska) ("the amendment to freeze pay * * * at the present level"); *id.* at 28879 (remarks of Rep. Harris) ("prohibit [officials] from receiving an increase in their salaries * * * [T]his amendment * * * withholds an increase for the coming year * * * [T]he amendment [would] prohibit a pay raise"); *ibid.* (remarks of Rep. Anderson of California) ("block a cost-of-living pay increase for the Congress, Senators, super grades in the executive branch, and Federal judges"); *ibid.* (remarks of Rep. Vander Veen) (Shipley Amendment would "achieve the same end" as a bill Representative Vander Veen had previously sponsored to "eliminate cost-of-living increases for Congressmen"); *id.* at 28880 (remarks of Rep. Spellman) ("cutting back the salaries").

[30] See 122 Cong. Rec. 31892 (1976) (remarks of Rep. Shipley) ("the conferees agreed to * * * language that makes it clear * * * that no October cost-of-living increases would be made to judges, Members of Congress, and certain executive positions * * *. [The bill] proscribed * * * the October cost-of-living pay increases"); *id.* at 31893 (remarks of Rep. Coughlin) ("[conferees] clarified the Shipley amendment to in-

Senate consideration of the provision reflected the same understanding. The Senate Report stated that the Shipley Amendment "would prohibit the payment of the cost of living salary increase projected for October 1, 1976, to not only Representatives, but Senators, Federal judges and all other Federal personnel whose salaries are currently [at a given level]. * * * [T]he House language * * * would prohibit the cost of living increases authorized by [the Adjustment] Act." S. Rep. No. 94-1201, 94th Cong., 2d Sess. 2 (1976); see also 122 Cong. Rec. 29130 (1976) (remarks of Sen. Hollings). Similarly, the floor debate in the Senate contained repeated references to the fact that the Pay Act would eliminate the 1976 cost-of-living increase under the Adjustment Act.[31] This view was also expressed

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sure that the cost-of-living pay freeze, would be prospective rather than retroactive * * * [and] retain[ed] House language making other top grades subject to the * * * pay freeze"); *id.* at 31896 (remarks of Rep. Riegle) ("elimination of the cost-of-living raise"); *ibid.* (remarks of Rep. Patten) ("freeze on judges' and top officials' salaries * * * [as well as] our own").

[31] See, *e.g.*, 122 Cong. Rec. 29130 (1976) (remarks of Sen. Hollings) ("prohibit the payment of the cost of living salary increase projected for October 1, 1976 * * * prohibit the cost of living increases authorized by the [Adjustment Act]"); *id.* at 29131-29132 (remarks of Sen. Allen) ("a freeze on salaries in the upper levels of all three branches of Federal service"; "the salary freeze * * * [adopted by] the House of Representatives"; "the House amendment providing for a salary freeze for top Federal officials in all three branches of Government"); *ibid.* (remarks of Sen. Taft) ("effectively freeze those salaries—the employees would not be given a cost-of-living raise on October 1, or a salary increase"); *id.* at 29164 (remarks of Sen. Allen) ("freezing the compensation of Members of Congress, House and Senate, the members of the judiciary, and the top ranking members of the executive branch"); *id.* at 29171 (remarks of Sen. Muskie) ("a freeze on * * * salaries"); *ibid.* (remarks of Sen. Helms) ("prevent implementation of a salary increase brought about by this past year's inflation"); *id.* at 29172 (remarks of Sen. Allen) ("denied the upcoming increase on October 1 * * * [T]heir salaries [would be] frozen at the September 30, 1976, level * * *"); *id.* at 29371 (remarks of Sen. Mathias) ("waived the annual cost-of-living increase"); *id.* at 29372 (remarks of Sen. Bartlett)

by Senator Hollings, the subcommittee chairman, who, in submitting the Conference Report on the bill, emphasized that the 1976 Pay Act "bars cost-of-living increases * * * this October" and "insure[s] that none of the affected positions would receive this year's cost-of-living increase * * *." 122 Cong. Rec. 31859, 31860 (1976).[32] See also *id.* at 31862 (remarks of Sen. Percy) ("disallowing pay raises for Federal judges, top Government officials and employees, and members of Congress * * * a pay freeze"). Thus, we submit that the legislative history of the 1976 Pay Act demonstrates that Congress intended to supersede the provisions of the Adjustment Act authorizing cost-of-living increases to take effect in October 1976. See *Pressler* v. *Simon*, *supra*, 428 F. Supp. at 302, 304, 305.[33]

("automatic pay raises * * * [are] eliminated"); *id.* at 29374 (remarks of Sen. Mathias) ("freezing executive level salaries"). See also *id.* at 29168 (letter from Justin A. Stanley, President, American Bar Association, to Sen. Hollings) (the 1976 Pay Act passed by the House "to repeal those provisions of [the Adjustment Act] which provide for cost of living adjustments for members of Congress, federal judges and federal executives"). In addition, in connection with the March 1977 quadrennial increase under the Federal Salary Act, Senator Byrd noted that the only salary adjustment received by high-ranking government officials between 1969 and 1977 had been the October 1975 cost-of-living increase. See 123 Cong. Rec. 7094–7095 (1977).

[32] We recognize that Senator Hollings had earlier stated that the 1976 Pay Act was "undraftsmanlike" because it "did not say that the salaries would not be increased under the law, but that the funds could not be used for any increases. The basic law is still there. There is a lawsuit about some of those already frozen, and we will apparently have another suit under this one." 122 Cong. Rec. 29168 (1976). This ambiguous statement can best be read as a criticism of the draftsmanship of the provision rather than as an affirmation of Congress' intent to leave intact the 1976 Adjustment Act increases. Senator Hollings' later remarks, quoted in the text, indicate that he agreed with his colleagues that the Pay Act substantively eliminated the Adjustment Act increases for 1976.

[33] In arguing that the 1976, 1978, and 1979 Pay Acts were only temporary and therefore were not intended substantively to alter the pro-

2. Contrary to the conclusion of the district court, the 1977 Pay Act quite plainly was intended to supersede the Adjustment Act increases for fiscal year 1978. Unlike the 1976 Pay Act, the 1977 Act was not an appropriations measure at all, but rather a substantive enactment that provided that the cost-of-living increases contemplated for October 1977, including increases under 28 U.S.C. 461 for Article III judges, "shall not take effect" (79-983 J.S. App. 32a). As explained in the House Report:

> The sole purpose of [the bill] is to eliminate the expected October 1977 comparability adjustment for certain individuals in the executive, legislative, and judicial branches whose rates of pay were increased earlier this year pursuant to the recommendations of the Quadrennial Commission [under the Federal Salary Act].
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> * * * * *
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> [The bill] is designed to deal with the anomalous situation of Members of Congress, high level Federal executives, and Federal judges receiving two pay raises in the same calendar year. This legislation prevents the possibility of such an occurrence by pro-

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visions of the Adjustment Act (79-983 Motion to Affirm 16-17; 79-1689 Motion to Affirm 15-16, 23-24), appellees have confused the distinction between *substantive* legislation and *permanent* legislation. In our view, it is immaterial whether these Pay Act limitations are temporary or permanent; indeed, we concede that these Acts are effective only for the given fiscal year and expire by their terms at the end of that period. Rather, the critical inquiry is whether, as we contend, Congress intended to extinguish federal officials' entitlement to the Adjustment Act increase during the fiscal year or whether, as appellees assert, it intended only to withhold funding for that increase but to leave intact the substantive obligation that could be enforced through litigation. See *United States* v. *Dickerson*, *supra*, 310 U.S. at 555 (statute "suspended the allowance for re-enlistment *during the fiscal year* ending June 30, 1939") (emphasis added); *United States* v. *Mitchell*, *supra*, 109 U.S. at 150 ("Congress has * * * expressed its purpose to reduce, *for the time being*, the salaries of the interpreters") (emphasis added).

> viding that the anticipated October 1977 comparability adjustment should not take effect for those individuals whose rate of pay were increased earlier this year pursuant to the recommendations of the Commission on Executive, Legislative, and Judicial Salaries.
>
> * * * * *
>
> This bill provides that the first comparability adjustment which would be made pursuant to the Executive Salary Cost-of-Living Adjustment Act (Public Law 94-82) after the date of the enactment of this legislation shall not take effect. The effect of this legislation would be to deny the anticipated October 1977 pay comparability adjustment to the Vice President, Members of Congress, Federal judges and justices, executive branch officials under the executive schedule, and certain other officials in the legislative and judicial branches whose pay is established under [the Federal Salary Act].
>
> * * * * *
>
> The intent of this legislation is to eliminate [for positions subject to the Federal Salary Act] the entire October 1977 comparability adjustment which will be specified in the report of the President transmitted to the Congress under [the Comparability Act].

H.R. Rep. No. 95-458, 95th Cong., 1st Sess. 1, 2, 3 (1977).[34] In these circumstances, the district court's sum-

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[34] The House Report also stated that under the 1977 Pay Act "the salaries of certain positions and individuals * * * [covered by the Federal Salary Act] shall not be increased by the * * * [October 1977] comparability pay adjustment" (H.R. Rep. No. 95-458, *supra*, at 1) and that the Act would "deny[] the anticipated October 1977 comparability increase [for specified positions]" (*id.* at 3). In addition, the Report noted that enactment of the Pay Act would result in an estimated annual saving of $36 million-$46 million between fiscal years 1978 and 1982 (*ibid.*), a conclusion plainly at odds with appellees' argument that the Pay Act left unaltered the government's substantive obligations pursuant to the Adjustment Act.

In accord with the House Report, the House and Senate floor debates also consistently reflected the view that the 1977 Pay Act super-

mary conclusion that the 1977 Pay Act did not supersede the provisions of the Adjustment Act cannot be sustained.[35]

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seded the October 1977 Adjustment Act increases for high-ranking federal officials, including judges. See, *e.g.*, 123 Cong. Rec. 7095 (1977) (remarks of Sen. Byrd) ("salaries * * * shall not be increased * * * [the bill] will thus obviate the effect of the comparability pay provisions [in October 1977 for Federal Salary Act officials]"); *ibid.* (remarks of Sen. Baker) ("forgo and rescind that adjustment"); *id.* at 7096 (remarks of Sen. Church) ("exclude Congress and other top-level Federal officials from the cost-of-living benefit this year"); *ibid.* (remarks of Sen. Percy) ("deny for this year only the annual cost-of-living increase scheduled to take place on October 1 for top governmental officials"); *ibid.* (remarks of Sen. Dole) ("temporarily eliminate the annual comparability pay raise for top-level Federal employees * * * the comparability adjustment scheduled for October 1977 would not take effect"); *id.* at 7125 (remarks of Sen. Byrd) ("deny the comparability pay increase scheduled to take effect on October 1 * * * eliminating the single pay increase to take effect in October"); *id.* at 7126 (remarks of Sen. Scott) ("prevents people * * * from receiving two pay raises in 1 year"); *id.* at 21121 (remarks of Rep. Solarz) ("will not be entitled to receive that increase when it comes due * * * prevent the comparability increase for Members of Congress, Federal judges, and high-level Federal executives * * * knock[s] out the comparability increase for this year"); *id.* at 21123 (remarks of Rep. Derwinski) ("salaries which were increased last March will be excluded from the next comparability pay adjustment which will occur in October * * * the sole purpose of [the bill] is to eliminate the expected October 1977 comparability adjustment for individuals in the executive, legislative, and judicial branches [covered by the Federal Salary Act]"); *id.* at 21124 (remarks of Rep. Markey) ("eliminating the October comparability pay increase"); *ibid.* (remarks of Rep. Grassley) ("suspend the pay raise for October 1977"); *id.* at 21125 (remarks of Rep. Ammerman) ("deny the October 1 cost-of-living pay increase to Senators and Members of Congress, Federal judges and top Government officials").

The legislative history of the 1978 Pay Act (see page 44 and page 45 note 37, *infra*) further confirms that the 1977 Act "rejected" the Adjustment Act increases for the year, thereby imposing a "cap" on salaries of high-ranking government officials. In the same way, the House Report accompanying the 1979 Pay Act (see page 47 note 38, *infra*) stated that salaries in fiscal year 1978 had been "frozen" under the 1977 Pay Act.

[35] Indeed, in the district court, appellees described the 1977 Pay Act as a "single year repealer" of the Adjustment Act, and they did not contend, as they had with the 1976 Act, that it could be construed as

3. The legislative history of the 1978 Pay Act also demonstrates that Congress intended to bar the cost-of-living increases scheduled for October 1978. The House Report noted that the Pay Act was a "change [in] the application of existing law" (H.R. Rep. No. 95-1254, 95th Cong., 2d Sess. 31 (1978)) and explained that it

> provid[es] for *a pay freeze* for those individuals in the legislative, executive, and judicial branches and in the government of the District of Columbia, whose rate of pay was directly or indirectly increased as a result of the pay increases which went into effect in 1977 under the [Federal Salary Act]. Under the proviso, any individual whose rate of pay is $47,500, or more, is covered *by the freeze during fiscal year 1979*.

H.R. Rep. No. 95-1254, *supra*, at 35 (emphasis added); see also *id.* at 29, 39. The Senate Report expressed the same understanding, emphasizing that the 1978 Pay Act "continues for fiscal year 1979 the so called 'cap' on upper level salaries in the Legislative, Executive, and Judicial branches of government." S. Rep. No. 95-1024, 95th Cong., 2d Sess. 50 (1978).[36] And the floor debates consistently recognized that the 1978 Pay Act was designed to

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anything but a substantive amendment of the Adjustment Act. See Memorandum in Support of Plaintiffs' Motion for Summary Judgment, at 33.

Appellees now argue (79-983 Motion to Affirm 21) that "had Congress intended [the 1977 Pay Act] to effect a repeal of the Adjustment Act, it could have attempted to do so by the use of clear and unequivocal statutory language." But it is difficult to conceive a more unambiguous declaration of congressional intent than the statutory provision that the Adjustment Act increases for fiscal year 1978 "shall not take effect."

[36] We also note that the 1978 Pay Act expressly provides (79-1689 J.S. App. 23a; emphasis added):

> For purposes of administering any provision of law, rule, or regulation which provides retirement, life insurance, or other

eliminate the scheduled cost-of-living increase. In introducing the Act, Representative Shipley, the chairman of the subcommittee, stated that the Act "provides for a pay freeze for those individuals in the legislative, executive, and judicial branches * * * whose rate of pay was either directly or indirectly increased [in 1977 under the Federal Salary Act]." 124 Cong. Rec. H5507 (daily ed. June 14, 1978). Representative Armstrong, the ranking minority member of the subcommittee, similarly explained that "automatic cost-of-living increases will not be permitted * * * ." *Id.* at H5508.[37] In light of these clear expressions of congressional intent, the district court erred in holding that the 1978 Pay Act did not foreclose the Adjustment Act increases for fiscal year 1979.

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employee benefit, which requires any deduction or contribution, or which imposes any requirement or limitation, on the basis of a rate of salary or basic pay, *the rate of salary or basic pay payable after the application of this section shall be treated as the rate of salary or basic pay.*

This provision, basing employee benefits and deductions on the employee's salary after application of the 1978 Pay Act, serves to confirm Congress' understanding that the Pay Act was a substantive limitation of the cost-of-living salary increase for fiscal year 1979.

[37] See also 124 Cong. Rec. H5509 (daily ed. June 14, 1978) (remarks of Rep. Derwinski) ("limit high-level salaries at this time, and that would include judiciary and executive branch as well as legislative"); *id.* at H5510 (remarks of Rep. Pattison) ("blocks Members of Congress and top-level Federal officials from receiving the 5-percent so-called cost-of-living salary adjustment this year. This is the second year in a row [since the March 1977 quadrennial increase] that we have refused a scheduled increase in our salaries. * * * [W]e rejected last year's adjustment and we are doing so again this year. * * * I am in complete agreement to turning down the pay raise this year"); *id.* at S12614 (daily ed. Aug. 4, 1978) (remarks of Sen. Sasser, the subcommittee chairman) ("freeze, during fiscal year 1979, the pay of any individual in the executive, legislative, and judicial branches of Government whose rate of pay is $47,500 per year or more"). In addition, the legislative history of the 1979 Pay Act (see page 47 note 38, *infra*) recognized that the 1978 Pay Act had "frozen" the salaries of high-ranking government officials.

4. An examination of the 1979 Pay Act likewise reveals that Congress intended the statute substantively to reduce the annual cost-of-living adjustment for fiscal year 1980. The Act explicitly states (79-1689 J.S. App. 24a-25a) that "notwithstanding the provisions of * * *the Executive Salary Cost-of-Living Adjustment Act, or any other related provision of law, which would provide an approximate 12.9 percent increase in pay * * *, [the 1978 Pay Act], which limit[s] the pay for certain Federal offices and positions, shall apply * * * for the fiscal year 1980 * * *." The 1979 Act further provides (*ibid.*) that, with respect to its application for fiscal year 1980, the 1978 Pay Act is amended to allow adjustments not to exceed 5.5% "for the purpose of limiting pay increases [for fiscal year 1980] to 5.5 percent." Finally, the 1979 Act also directs (*ibid.*) that the 5.5% increase "if accepted shall be in lieu of the 12.9 percent [otherwise] due for such fiscal year [1980]." On its face, then, the 1979 Pay Act clearly demonstrates that it was designed to limit the cost-of-living salary increases for fiscal year 1980 irrespective of the Adjustment Act or any other provision of law.

The legislative history of the 1979 Pay Act confirms that the legislation constituted a substantive enactment. The House Report stated that the Act "reduces Federal executive pay increases from the mandatory entitlement of 12.9 per centum to 5.5 per centum," a result that was recognized to be a "change [in] the application of existing law." H.R. Rep. No. 96-500, 96th Cong., 1st Sess. 7 (1979). In explaining the purpose of the Pay Act, the House Report further stated (*id.* at 3; emphasis added):

> Our problem is that our rate of inflation is so great that we must take immediate steps to moderate increases and help move toward stability.

> One of these places where such laws have taken over is that of Federal executive pay, which *under existing law* would increase by 12.9 percent.
>
> In an effort to help deal with these problems, the committee is providing that for the fiscal year 1980, funds available for payment to executive employees, which includes Members of Congress, who *under existing law* are entitled to approximately 12.9-percent increase in pay, shall not be used to pay any such employee or elected or appointed official any sum in excess of 5.5-percent increase in existing pay and such sum if accepted shall be in lieu of the 12.9 percent due for such fiscal year. This action, *sharply decreasing such automatic increases*, is taken in an effort to contribute toward the objective of immediately slowing and over a period eventually stopping further inflation. *The limitation of 5.5 percent represents a significantly sharp decrease* and amounts to only about one-fourth to one-third of the actual rate of inflation during this period. It is hoped that this example will be followed by other parts of the Federal Government, private industry, and State and local government. Unless we slow down, we face disastrous inflation which has wrecked the economy of other nations.[38]

The Conference Report reiterated that, in order to help combat the urgent national problem of inflation, the 1979 Pay Act "restricts Cost-of-Living increases to 5.5 percent instead of the 12.9 percent provided by law, for executive employees, including Cabinet officers, agency heads, Members of the House of Representatives and Senators, federal judges, various high ranking departmental and agency officers, certain supergrade personnel, and others * * *." H.R. Conf. Rep. No. 96-513, 96th Cong., 1st Sess.

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[38]The House Report also recognized (H.R. Rep. No. 96-500, *supra*, at 3) that "in the last 2 years * * * [since the quadrennial review of 1977] Federal executive pay has been frozen."

3 (1979). And the debate in both Houses plainly disclosed the congressional understanding that the 1979 Pay Act would restrict the salary increase for fiscal year 1980 to 5.5% and thereby prevent the larger increase provided under the Adjustment Act.[39]

Thus, we submit that Congress unquestionably intended the Pay Acts to supersede the provisions of the Adjustment Act authorizing cost-of-living increases for fiscal years 1977–1980.

B. The 1979 Pay Act Is Applicable To Article III Judges

With respect to the 1979 Pay Act, the additional statutory question is presented whether the Act applies at all to

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[39] See 125 Cong. Rec. H8850 (daily ed. Oct. 9, 1979) (remarks of Rep. Latta) ("the 5.5 percent the Committee on Appropriations has allowed * * * is a reduction from the 12.9 percent authorized under present law"); *id.* at H8852 (remarks of Rep. Whitten, chairman of the committee) ("[t]his action * * * sharply decreas[es] such automatic increases"); *id.* at H8854 (remarks of Rep. Jacobs) ("rollback of the automatic 12.9-percent salary increase"); *id.* at S14320 (daily ed. Oct. 10, 1979) (remarks of Sen. Magnuson) ("a 5.5 percent pay raise"); *id.* at S14483 (daily ed. Oct. 12, 1979) (remarks of Sen. Young) ("a 5.5 percent pay raise * * * [the Act would] reduce the 12.9 [percent salary increase] to 5.5 percent. * * * This provides for limiting the cost-of-living increase to 5.5 percent, rather than the 12.9 percent automatic increase now in effect"); *ibid.* (remarks of Sen. Byrd) ("put a cap on that [12.9 percent] pay increase and make it 5.5 percent"); *id.* at S14484 (remarks of Sen. Magnuson) ("this is in the nature of a cap, a limitation [on the 12.9 percent increase]"); *id.* at S14486 (remarks of Sen. Stevens) ("the 5.5 [percent] pay cap"); *id.* at H9076 (remarks of Rep. Whitten) ("a cap on the amount of compensation * * * which limits the amount to the 5.5 percent as against the 12.9 percent which is provided by law, but for which no appropriation has been made"); *id.* at H9080 (remarks of Rep. Conte, ranking minority member of the committee) ("reduces from 12.9 to 5.5 percent the increase in pay"); see also 125 Cong. Rec. S16706 (daily ed. Nov. 15, 1979) (remarks of Sen. Mathias) ("lowering the judicial salaries on October 12, along with those of other senior Federal officers").

federal judges. Appellees argue (79-1689 Motion to Affirm 18-19), and the district court indicated that it was "inclined to agree" (79-1689 J.S. App. 9a), that the Act is inapplicable to judges because it is limited to "executive employees, which includes Members of Congress" (*id.* at 24a).[40]

We submit that the 1979 Pay Act by its terms does apply to the judiciary because the phrase "executive employees," as used in this area of the law, is a term of art that includes federal judges. Indeed, the very statute that provides the annual salary increase for judges is entitled the "*Executive* Salary Cost-of-Living Adjustment Act" (79-1689 J.S. App. 14a; emphasis added). The phrase "executive employees" in the 1979 Pay Act therefore should be understood to mean those persons whose cost-of-living increases are governed by the Adjustment Act.[41] Moreover, wholly apart from the provision cited by appellees, the 1979 Pay Act expressly states that the 1978 Pay Act, as amended to allow a limited 5.5% cost-of-living increase, "shall apply" to the fiscal year 1980 adjustments (79-1689 J.S. App. 24a). Since the 1978 Act plainly covers

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[40] See also *Foley* v. *Carter*, Civ. No. 79-3063 (D.D.C. Mar. 24, 1980), appeal pending, Nos. 80-1548, 80-1551 (D.C. Cir. filed May 21, 1980). In *Foley*, an action brought by the Director of the Administrative Office of the United States Courts, the district court held, in agreement with the contention of appellees here, that the 1979 Pay Act "does not apply to the judicial branch" (slip op. 11). The Congressional Research Service, on the other hand, has concluded that the 1979 Pay Act does apply to judges' salaries. See *Diminution of Judicial Salaries*, *supra*, 125 Cong. Rec. at S16707. Likewise, appellees themselves have earlier acknowledged (79-983 Motion to Affirm 19) that the 1979 Pay Act is applicable to federal judges.

[41] Under this reading, the parenthetical phrase "which includes Members of Congress" is nothing more than a deliberate redundancy designed to emphasize, in the context of the political process, that congressional salaries were explicitly subject to the limitations of the 1979 Pay Act.

the "judicial branch" (*id.* at 22a), it is evident that the 1979 Pay Act on its face is applicable to federal judges.

This conclusion is strongly supported by the legislative history of the 1979 Pay Act. The Conference Report unambiguously stated that the Act "restricts Cost-of-Living increases to 5.5 percent instead of the 12.9 percent provided by law, for executive employees, including * * * federal judges * * *." H.R. Conf. Rep. No. 96-513, *supra*, at 3. Similarly, Representative Whitten, the manager of the Act in the House, explained that the Act "appl[ies] the 5.5-percent cap to the Federal judges * * *" (125 Cong. Rec. H8853 (daily ed. Oct. 9, 1979)). Other legislators also acknowledged the applicability of the Act to federal judges. See *id.* at H8850 (remarks of Rep. Latta); *id.* at H8854 (remarks of Rep. Jacobs); *id.* at S14486 (daily ed. Oct. 12, 1979) (remarks of Sen. Stevens); see also *id.* at H8138-H8139 (daily ed. Sept. 19, 1979) (remarks of Rep. Derwinski); *id.* at S16706 (daily ed. Nov. 15, 1979) (remarks of Sen. Mathias). Nothing in this legislative record suggests in any way that federal judges, who had consistently been included in the several preceding Pay Acts, were to be exempted from the 1979 Pay Act.[42]

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[42] We recognize that some members of Congress doubted whether the 1979 Pay Act could constitutionally be applied to federal judges to reduce the cost-of-living salary increase that had previously become effective. See 125 Cong. Rec. S14486-S14487 (daily ed. Oct. 12, 1979) (remarks of Sen. Stevens); see also *id.* at S16706 (daily ed. Nov. 15, 1979) (remarks of Sen. Mathias). Other members of Congress took the position that application of the Act to federal judges would not be unconstitutional and urged that the matter be resolved by the courts. See *id.* at H8854 (daily ed. Oct. 9, 1979) (remarks of Rep. Jacobs). Still others noted the issue and recommended that it be left to the courts. See *id.* at H8852 (remarks of Rep. Whitten); cf. *id.* at H8850 (remarks of Rep. Latta). However, all of these statements concerning the constitutionality of the Act, including the remarks of Senator Stevens relied on by appellees (79-1689 Motion to Affirm 18-19 n.12) and by the district court in *Foley* v. *Carter*, *supra*, slip op. 10-11, were premised

III. THE 1976, 1977, AND 1978 PAY ACTS DID NOT DIMINISH THE COMPENSATION OF ARTICLE III JUDGES

Assuming the Court finds that Congress intended the Pay Acts to supersede the Adjustment Act increases, we submit that the 1976, 1977, and 1978 Pay Acts did not diminish the "compensation" of Article III judges because, at the time these statutes were enacted, the annual cost-of-living adjustments had not yet become a part of the judges' salaries. Accordingly, the 1976, 1977, and 1978 Pay Acts, in failing to allow the expected increases to occur, did not constitute a diminishment of compensation within the meaning of the Compensation Clause.[43]

The district court in *Will I* held that, upon enactment of the Adjustment Act in 1975, "the right to an annual adjustment, measured by the average adjustment in the General Schedule, became a part of a judges' [*sic*] compensation which may not be 'diminished.' * * *[The Compensation Clause requires] that once the method [for determining judicial compensation] is selected it not be altered to diminish the compensation to which judges are

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on the recognition that the Act, as drafted and eventually signed into law, did apply to judges.

We also note that identical language regarding "executive employees, which includes Members of Congress" was contained in an earlier version of the 1979 Pay Act that, if passed, would have superseded the 1979 adjustments before they took effect. See 125 Cong. Rec. H8444 (daily ed. Sept. 25, 1979). Thus, it cannot be argued that the language of the 1979 Pay Act was designed to exempt federal judges because of congressional concern over the constitutionality of reducing salary increases that had already gone into effect for judges.

[43] Since Congress enacted the 1979 Pay Act on October 12, 1979, 11 days after the cost-of-living increase for fiscal year 1980 had gone into effect for judges (see pages 11–13, *supra*), the 1979 Pay Act cannot be defended on the ground that it was not a diminution of the judges' compensation. No issue is presented in this case concerning judges' pay for the period October 1 through October 11, 1979.

entitled" (79-983 J.S. App. 8a, 14a-15a). The court reiterated this view in *Will II*, stating that "subsequent to the 1975 [enactment of the Adjustment Act], the judge's compensation became an annual salary as adjusted by the cost-of-living increase percentage" (79-1689 J.S. App. 6a).[44] Based on this definition of compensation, the court concluded that the failure to pay the 1976, 1977, and 1978 cost-of-living increases amounted to a diminution that contravened the Compensation Clause.

We believe that the district court misconstrued the operation of the Adjustment Act and the meaning of the Compensation Clause in this regard. Although, as the district court noted, Congress has provided that federal judges "shall receive a salary at an annual rate determined under [the Federal Salary Act], as adjusted by [the Adjustment Act]" (79-1689 J.S. App. 16a), the Adjustment Act itself expressly specifies that the annual adjustment for judges becomes effective as of the first day of the month in which a GS adjustment takes effect pursuant to the Comparability Act (see page 8, *supra*).[45] Prior to that

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[44] As appellees state the point (79-983 Motion to Affirm 25; 79-1689 Motion to Affirm 22), "while the salary adjustment might not be paid out until October 1 of each year * * * the entitlement to that adjustment 'vested' with the enactment of the 1975 Executive Cost-of-Living Adjustment Act."

[45] The Adjustment Act explicitly provides that, as of the effective date for a cost-of-living increase, "each salary rate * * * shall be adjusted" in accordance with the Comparability Act increases in the GS salaries (79-983 J.S. App. 26a). This use of the future tense further indicates the congressional intent that the Adjustment Act increases were not part of a judge's compensation until they actually took effect.

The legislative history of the Adjustment Act confirms that Congress intended the annual cost-of-living adjustment to take effect for the particular fiscal year in accordance with the effective day of the GS adjustment under the Comparability Act. See S. Rep. No. 94-333, 94th Cong., 1st Sess. 4 (1975) ("The adjustment would take effect at the beginning of the first month in which the adjustment under [the Com-

time, the Adjustment Act increases for the fiscal year are not yet in effect, and judges, like other officials covered by the Adjustment Act, have only an expectancy that they will receive the anticipated adjustment, not an entitlement or a vested right to it. "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than an unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972).[46] Until the annual cost-of-living increases actually take effect for each fiscal year and thus become a part of their compensation—*i.e.*, become payment "receive[d] for their services" (Article III, Section

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parability Act] occurs. Unless altered by an alternative plan proposed by the President, * * * [the Comparability Act] adjustment occurs as of the beginning of the first applicable pay period commencing on or after October 1 of each year"); 121 Cong. Rec. 25745 (1975) (remarks of Sen. McGee in introducing the Adjustment Act) ("[the adjustment] would go into effect October 1 each year"); *id.* at 25374 (remarks of Sen. McGee) ("[t]he adjustment would become effective whenever a comparability increase is made in the statutory pay systems, usually in October of each year"); *id.* at 25382 (remarks of Sen. McGee) ("[u]nder this law, as being amended here, [the increase] would come at the regular time that it does under the existing law now, and that is by October 1").

[46] We note that any one of several contingencies could defeat the judges' expectation of a cost-of-living adjustment. For example, it might be that an increase in the GS rates of pay is not warranted pursuant to the Comparability Act, in which case there would be no increase under the Adjustment Act; the President could determine, in light of national emergency or adverse economic conditions, that a GS increase is inappropriate notwithstanding the principle of comparability; Congress could, as appellees concede (Plaintiffs' Reply Brief in Support of Their Motion for Summary Judgment, at 5 n.5, 8–9), repeal the Comparability Act or otherwise eliminate the GS adjustment; Congress could repeal the Adjustment Act altogether; or, as occurred in 1976, 1977, 1978, and 1979, Congress could supersede the increases contemplated by the Adjustment Act for high-ranking federal officials. These possibilities illustrate the contingent and defeasible nature of appellees' claim to an Adjustment Act increase for any particular fiscal year. Cf. *Benedict* v. *United States*, 176 U.S. 357, 360–361 (1900).

1)—federal judges have no unalterable right to those increases. Cf. *United States* v. *Larionoff*, 431 U.S. 864, 879 (1977) ("Congress may prospectively reduce the pay of [government officials], even if that reduction deprived * * *[them] of benefits they had expected to be able to earn"). This analysis reflects the established distinction between withholding a benefit that is expected to be conferred in the future, such as an anticipated cost-of-living adjustment, and withdrawing a benefit that is already being enjoyed, such as an operative salary increase. As the Court recently explained in *Greenholtz* v. *Nebraska Penal Inmates*, 442 U.S. 1, 9, 10, 11 (1979) (parole release):

> There is a crucial distinction between being deprived of a * * *[benefit] one has, * * * and being denied a * * * [benefit] that one desires.
>
> * * * * *
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> The differences between an initial grant of * * *[a benefit] and the revocation of * * *[an existent benefit] are well recognized.
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> * * * * *
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> That the [government] holds out the *possibility* of * * * [a benefit] provides no more than a mere hope that the benefit will be obtained. [Emphasis in original.]

Furthermore, we do not believe this issue would be materially different if the Adjustment Act had expressly reserved to Congress the power to supersede an annual salary increase prior to its effective date. Such authority to amend or repeal legislation is necessarily retained by Congress in all cases. See, *e.g.*, *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 534 (1962) (plurality opinion); *United States* v. *Dickerson*, *supra*, 310 U.S. at 555; *Butler* v. *Pennsylvania*, 51 U.S. (10 How.) 402, 416–417 (1850); *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87, 135 (1810). Under the

hypothetical statute, however, it seems inconceivable that appellees would insist that their right to the increase had accrued before the effective date had passed. In our view, this illustrates the highly theoretical and technical basis for appellees' claim of a current entitlement to all future salary increases authorized by the Adjustment Act. Accordingly, we submit that the Compensation Clause does not preclude Congress from acting, before the cost-of-living increase takes effect, to supersede the scheduled adjustment.[47]

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[47] The California Court of Appeals has similarly concluded that a prospective cost-of-living adjustment is not part of a judge's salary and that the elimination of such a prospective increase is not a reduction in salary:

> [I]t is one thing to view [the California Constitution] as protective of salary increases that have become due and payable, and another to argue * * * that it also prevents modification of all prospective salary adjustments.
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> * * * * *
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> Although [the California statute] provided that judges would receive annual cost-of-living increases, those future increases did not become *salary* within the meaning of [the California Constitution] until they had become payable as current salary. * * *
>
> * * * Elimination of a [p]rospective [i]ncrease in [s]alary [i]s [n]ot a [r]eduction in [salary].

Olson v. *Cory*, 93 Cal. App. 3d 942, 156 Cal. Rptr. 127, 138, 140, (1979), rev'd, 26 Cal. 3d 672, 609 P.2d 991, 164 Cal. Rptr. 217 (1980). Although neither the decision of the California Court of Appeals nor the decision of the California Supreme Court is controlling on the federal constitutional issues presently before this Court, we suggest that the Court should look to the opinion of the California Court of Appeals as the better reasoned and more persuasive discussion of the relevant considerations.

The position we urge here—that the elimination of a future salary increase is not a diminution of compensation within the meaning of the Compensation Clause—has also been reached by the Congressional Research Service. See *Diminution of Judicial Salaries*, *supra*, 125 Cong. Rec. at S16708 (footnotes omitted):

> Assume enactment of a law setting judicial salaries at x amount; the law would probably fix a date at which it became effective,

Moreover, this result is consistent with the history of the Compensation Clause. As originally proposed, the Clause would have prohibited increases as well as de-

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say, judges are to receive x amount beginning October 1. Although the measure is law, it would appear that prior to October 1, Congress could enact a new law providing for x-y compensation, since the statute had not gone into operation and judges were not yet entitled to the amount. And, indeed, it would appear that Congress could provide that x-y is to be the compensation in an appropriations law. The assumption is that until the effective date of the increase, Congress may repeal or alter it.

The cases upon which appellees rely (79-983 Motion to Affirm 23-25; 79-1689 Motion to Affirm 21-23) are not to the contrary. In *United States* v. *More* (C.C.D.C. 1803), set forth at 7 U.S. (3 Cranch) 159, 160-165 n. (1805), the circuit court held that an act of Congress abolishing the fees received by justices of the peace was invalid under the Compensation Clause with respect to a magistrate already in office, and it therefore sustained a demurrer to an indictment charging the unlawful receipt of such fees. These fees were clearly a part of the established compensation of the justices of the peace; although the fees were determined and payable at the time services were rendered, the justices' legal entitlement to receive the fees existed at the time the statute abolishing the fees was enacted, and such fees had previously been received pursuant to that authority. No question was presented in *More* concerning the operative date of the justices' entitlement to this compensation, and no argument was made that the statute did not diminish the justices' compensation. In contrast, the question in the instant cases is whether the Pay Acts prevented the expected cost-of-living increases from taking effect and therefore did not reduce appellees' compensation. While *More* supports the view that the Compensation Clause extends to elements of judges' compensation that have gone into effect but have not yet been paid, it does not address the distinct issue whether such compensation has in fact taken effect.

Likewise, *Stiftel* v. *Malarkey*, 384 A.2d 9 (Del. Sup. Ct. 1977), is also inapposite here. The court in *Stiftel* rejected the argument that there was a difference in principle between application of a statutory adjustment formula and an increase of a specified dollar amount (*id.* at 16). We agree that there is no meaningful distinction, for purposes of the protections accorded judges' compensation, between a liquidated or sum-certain increase and an increase calculated on the basis of a formula. In our view, however, such an increase, in whatever form, does not become part of the judges' compensation until its effective date, and we do not read *Stiftel* to have passed on this latter issue.

creases in judges' compensation. See Rosenn, *The Constitutional Guaranty Against Diminution of Judicial Compensation*, 24 U.C.L.A. L. Rev. 308, 312–313 (1976); Fellman, *The Diminution of Judicial Salaries*, 24 Iowa L. Rev. 89, 91 (1938). On Gouverneur Morris' motion, the prohibition on increases was deleted. Rosenn, *supra*, 24 U.C.L.A. L. Rev. at 313; Fellman, *supra*, 24 Iowa L. Rev. at 91. James Madison strongly opposed this change, arguing that it would lead to judicial dependence on the legislature. Rosenn, *supra*, 24 U.C.L.A. L. Rev. at 313–314; Fellman, *supra*, 24 Iowa L. Rev. at 91–92. As Madison stated:

> The dependence will be less if the *increase* alone should be permitted, but it will be improper even so far to permit a dependence. Whenever an increase is wished by the Judges, or may be in agitation in the legislature, an undue complaisance in the former may be felt towards the latter. [Emphasis in original.]

2 M. Farrand, *The Records of the Federal Convention of 1787* 45 (1966). Morris' motion to strike the prohibition on increases was carried, and Madison's subsequent attempts to reinstate the restriction proved unsuccessful. Rosenn, *supra*, 24 U.C.L.A. L. Rev. at 314 & n.24; Fellman, *supra*, 24 Iowa L. Rev. at 92. Thus, the history of the Compensation Clause reveals that, notwithstanding concerns expressed about the effect on judicial independence, the Founding Fathers deliberately empowered Congress to raise, or to refuse to raise, the salaries of federal judges. See *Atkins* v. *United States*, 556 F.2d 1028, 1051 (Ct. Cl. 1977), cert. denied, 434 U.S. 1009 (1978) (authority of Congress to increase or decline to increase judicial salaries "permits and even contemplates a 'feeling of dependence upon the legislature' to an extent"). In our view, there is no meaningful difference between the authority of

Congress, recognized by the drafters of the Compensation Clause, to consider but refuse to enact salary increases for Article III judges and its analogous authority to rescind an increase that has not yet gone into effect.

Finally, the district court's holding—that future increases under the Adjustment Act are part of a judge's compensation protected by the Compensation Clause—would unduly limit the constitutional province of Congress. Under the decisions below, Congress would be forever prevented from modifying the law in any manner that would afford sitting Article III judges a lesser salary than they would receive pursuant to the annual operation of the Adjustment Act.[48] Indeed, appellees assert that this consequence is the "virtue, not [the] vice," of the Compensation Clause (79-983 Motion to Affirm 27 n.25):

> [T]he only limitation [the Compensation Clause] imposes is * * * that once a system is selected * * * the system may not be altered in a manner that would deprive a judge of any compensation that system provides.

We doubt that the Compensation Clause and the Adjustment Act can sensibly be read, as the district court did, to provide a perpetual guarantee that judges will continue to receive not only their present salaries but also "an annual adjustment, measured by the average adjustment in the General Schedule" (79-983 J.S. App. 8a), and thus permanently to freeze into law, as a matter of constitutional doctrine, the Adjustment Act plan that Congress adopted only five years ago. Such a result would be a serious and wholly unjustified intrusion upon the constitutional powers of Congress and might serve to inhibit innovation and ex-

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[48]The district court's reasoning also suggests that the Federal Salary Act of 1967 would likewise be frozen into law with respect to sitting federal judges.

perimentation in this area and to discourage enactment of additional benefits for judges.[49]

In light of this analysis, the 1976, 1977, and 1978 Pay Acts did not diminish the compensation of Article III judges. The Comparability Act increases for 1976, 1977, and 1978 became effective in October of each year, and therefore, but for the Pay Acts, the annual adjustments for judges would have taken effect on October 1.[50] Prior to that time, judges had neither received nor become entitled to receive a cost-of-living increase under the express terms of the Adjustment Act. Accordingly, the 1976, 1977, and 1978 Pay Acts, by forestalling the annual increases, did not violate the Compensation Clause.[51]

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[49] As the California Court of Appeals explained in *Olson* v. *Cory*, *supra*, 156 Cal. Rptr. at 140–141 (see note 47, *supra*):

> The complexity of [the legislature's] task [in setting salaries] counsels judicial caution in construing * * * the Constitution so broadly that any experiment with a new mechanism for determining future salary increases becomes cast in constitutional stone.
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> * * * * *
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> Plaintiffs' interpretation of [the Constitution], if accepted, would seriously cripple the power of the Legislature to take effective action in an important and sensitive area of its concern—its fixing of judicial salaries * * *. Under plaintiffs' interpretation the Legislature would become a kind of sorcerer's apprentice—able to turn on the money spigot but never able to shut it off. It is one thing to insist, as the Constitution does, that a present salary, once established, may not be reduced during a judge's term of office; it is another to argue that a legislative experiment to find a better mechanism for setting judicial salaries has been transmuted into an irreversible economic grant.

[50] See pages 8–13, *supra*.

[51] The 1977 and 1978 Pay Acts were enacted, respectively, on July 11, 1977, and September 30, 1978 (see pages 10–11, *supra*). The 1976 Pay Act was passed by the House on September 1, 1976, and by the Senate on September 8; the Conference Report was adopted by both Houses on September 22. See 122 Cong. Rec. 28881, 29377, 31863,

IV. THE COMPENSATION CLAUSE IS NOT VIOLATED BY A STATUTORY DIMINUTION OF JUDICIAL SALARIES THAT DOES NOT DISCRIMINATE AGAINST ARTICLE III JUDGES OR UNDERMINE THEIR INDEPENDENCE

With respect to the 1979 Pay Act (see page 51 note 43, *supra*), and to the extent the Court concludes that the 1976, 1977, or 1978 Pay Act resulted in a diminution of judges' salaries, we submit that the Compensation Clause is not violated by a statute that, like the Pay Acts, does not discriminate against Article III judges or undermine their independence.

Although this Court has had little occasion to consider the Compensation Clause, the purpose of the Clause is well established. As Alexander Hamilton explained in *The Federalist* No. 79, the Clause was intended "to put it out of the power of [Congress] to change the condition of the individual [judge] for the worse. A man may then be sure

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31896-31897 (1976). However, the bill was not signed by the President until October 1, the day that the Adjustment Act increases for judges would otherwise have taken effect, and also the day that Exec. Order No. 11941 (3 C.F.R. 151 (1976 Compilation)), implementing the Adjustment Act for that year, was issued. Appellees contend (79-983 Motion to Affirm 22-23) that for at least a few hours on October 1, 1976, they were entitled to the increased pay that the 1976 Pay Act then purported to take from them. The general rule has long been established, however, that, unless otherwise required by "substantial justice," a statute is deemed effective from the first moment of the day on which it was enacted regardless of the precise time it was actually approved by the President. See *Taylor* v. *Brown*, 147 U.S. 640, 645-646 (1893); *United States* v. *Norton*, 97 U.S. 164, 170 (1877); *Lapeyre* v. *United States*, 84 U.S. (17 Wall.) 191, 198 (1872); *Central Maryland Lines, Inc.* v. *United States*, 240 F. Supp. 254, 257 (D. Md. 1965). Here, no penalty of any kind is imposed by the 1976 Pay Act, and no other reason of "substantial justice" requires departure from the general rule. See *Louisville* v. *Savings Bank*, 104 U.S. 469, 478-479 (1881); *Burgess* v. *Salmon*, 97 U.S. 381 (1878); *United States* v. *Casson*, 434 F.2d 415, 418-419 (D.C. Cir. 1970). Thus, the 1976 Pay Act precluded the Adjustment Act increases from taking effect, and appellees were never entitled to the 1976 cost-of-living adjustment.

of the ground upon which he stands, and can never be deterred from his duty by the apprehension of being placed in a less eligible situation." The same explanation was offered by the Court in *Evans* v. *Gore*, *supra* 253 U.S. at 248, 253:

> With what purpose does the Constitution provide that the compensation of the judges "shall not be diminished during their continuance in office"? Is it primarily to benefit the judges, or rather to promote the public weal by giving them that independence which makes for an impartial and courageous discharge of the judicial function?
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> [T]he primary purpose of the prohibition against diminution was * * *, like the clause in respect of tenure, to attract good and competent men to the bench and to promote that independence of action and judgment which is essential to the maintenance of the guaranties, limitations and pervading principles of the Constitution and to the administration of justice without respect to persons and with equal concern for the poor and the rich.

See also *id.* at 265 (Holmes, J., dissenting). The Court reiterated this understanding in *O'Donoghue* v. *United States*, 289 U.S. 516, 530–534 (1933), where, in discussing the propriety of judges' commencing litigation concerning their own salaries, it stated (*id.* at 531, 533):

> In framing the Constitution therefore, the power to diminish the compensation of the federal judges was explicitly denied, in order, *inter alia*, that their judgment or action might never be swayed in the slightest degree by the temptation to cultivate the favor of or avoid the displeasure of [Congress] which, as master of the purse, would otherwise hold the power to reduce their means of support.
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> * * * * *

> [The Compensation Clause was designed] not for [the judges'] private advantage * * * but in the interest of preserving unimpaired an essential safeguard adopted as a continuing guaranty of an independent judicial administration for the benefit of the whole people.

See also *Toth* v. *Quarles*, 350 U.S. 11, 16 (1955); *Atkins* v. *United States*, *supra*, 556 F.2d at 1043-1045, 1048-1049, 1051.

The leading, and most recent, decision of this Court regarding the Compensation Clause is *O'Malley* v. *Woodrough*, 307 U.S. 277 (1939). In *Woodrough*, the Court upheld the validity of the federal income tax statute as applied to federal judges who assumed office after the passage of the statute. Finding that the tax did not discriminate against federal judges or impair the independence of the federal judiciary, the Court rejected the contention that the statute infringed the Compensation Clause (*id.* at 281-282; footnotes omitted):

> [T]he question immediately before us is whether Congress exceeded its constitutional power in providing that United States judges appointed after the Revenue Act of 1932 shall not enjoy immunity from the incidences of taxation to which everyone else within the defined classes of income is subjected. Thereby, of course, Congress has committed itself to the position that a non-discriminatory tax laid generally on net income is not, when applied to the income of a federal judge, a diminution of his salary within the prohibition of Article III, § 1, of the Constitution. To suggest that it makes inroads upon the independence of judges who took office after Congress had thus charged them with the common duties of citizenship, by making them bear their aliquot share of the cost of maintaining the Government, is to trivialize the great historic experience on which the framers based the safeguards of Article III, § 1. To subject them to a general tax is merely to recognize that judges are also

> citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are charged with administering.

Woodrough expressly overruled (307 U.S. at 283) the decision in *Miles* v. *Graham*, 268 U.S. 501 (1925), which had invalidated, under the Compensation Clause, the application of the income tax to federal judges appointed after the inception of the tax. *Woodrough* also criticized the decision in *Evans* v. *Gore*, *supra*, which had overturned the federal income tax statute as applied to federal judges who took office prior to enactment of the tax. The Court in *Woodrough* noted that *Evans* "was contrary to the way in which [the Compensation Clause] was read by other English-speaking courts * * * [,] met wide and steadily growing disfavor from legal scholarship and professional opinion* * *[and] was rejected by most of the courts before whom the matter came after that decision" (307 U.S. at 281; footnotes omitted). These observations by the Court, as well as the Court's basic analysis, show that the decision in *Woodrough* repudiated *Evans*' central premise that the Compensation Clause is "directed against all diminution, whether for one purpose or another * * * " (253 U.S. at 255) and serves to protect a judge's compensation "from diminution in any form" (*id.* at 263).[52]

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[52]The *Woodrough* opinion echoed Justice Holmes' dissent in *Evans* v. *Gore* that requiring "a man to pay the taxes that all other men have to pay cannot possibly be made an instrument to attack his independence as a judge" (253 U.S. at 265), and Justice Butler, in his dissent in *Woodrough*, recognized that the Court's decision "destroy[s] the decision in *Evans* v. *Gore*" (307 U.S. at 297) and "repudiates its earlier decisions" in *Evans* v. *Gore* and *Miles* v. *Graham* (307 U.S. at 299). Lower federal courts and commentators have also read *Woodrough* as disapproving the *Evans* holding. See, *e.g.*, *Atkins* v. *United States*, *supra*, 556 F.2d at 1043, 1044, 1045; *Magruder* v. *Brown*, 106 F.2d

In our view, *Woodrough* sets forth the governing principles under the Compensation Clause. Applying those principles here, it is evident that the Pay Acts did not violate the Constitution. There is no evidence whatever that the Acts were prompted by Congress' antagonism against the judiciary or its displeasure with any particular federal judges or judicial decisions, and appellees have not alleged that the Pay Acts constituted an attack on judicial independence or discriminated against federal judges. As fully discussed above (see pages 36–48, *supra*), the Pay Acts were based on important policy considerations extending far beyond the federal judiciary, and they did not, in either purpose or effect, "make[ ] inroads upon the independence of judges" (*O'Malley* v. *Woodrough*, *supra*, 307 U.S. at 282).[53] Similarly, the Pay Acts did not discriminate against federal judges, but rather were equally applicable to a broad range of ranking government officials, including the Vice President, Cabinet officers and

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428, 430, 431 (4th Cir. 1939), cert. denied, 308 U.S. 624 (1940); Rosenn, *The Constitutional Guaranty Against Diminution of Judicial Compensation*, 24 U.C.L.A. L. Rev. 308, 332–333 n.94 (1976); 53 Harv. L. Rev. 137 (1939); 15 Ind. L.J. 159, 161 n.11 (1939); 13 S. Calif. L. Rev. 131, 132 (1939); cf. *Gunn* v. *Dallman*, 171 F.2d 36, 37 (7th Cir. 1948) (Minton, J.), cert. denied, 336 U.S. 937 (1949) (under *Woodrough*, independence of state judges is not impaired by requiring them to pay federal income taxes). And in *Baker* v. *Commissioner*, 149 F.2d 342, 344 (4th Cir.), cert. denied, 326 U.S. 746 (1945), the court stated that under *Woodrough* a judge could constitutionally be required to pay higher taxes as part of a general increase in the tax system, a conclusion that implicitly acknowledges that the *Evans* analysis was discredited by *Woodrough*.

[53] It is unnecessary in this case for the Court to decide whether both the purpose and the effect of undermining the independence of the judiciary are necessary to establish a violation of the Compensation Clause, since neither element is satisfied here. See *Atkins* v. *United States*, *supra*, 556 F.2d at 1054. In view of our reading of *O'Malley* v. *Woodrough*, we do not consider this issue to have been authoritatively answered by the decision in *Evans* v. *Gore*.

Executive Schedule personnel, and members of Congress. See *Duplantier* v. *United States*, 606 F.2d 654, 669 (5th Cir. 1979), petition for cert. pending on other grounds, No. 79-1180 (filed Jan. 31, 1980); *Atkins* v. *United States*, *supra*, 556 F.2d at 1055-1057. Just as federal judges "are also citizens" and thus subject to "the common duties of citizenship" (*O'Malley* v. *Woodrough*, *supra*, 307 U.S. at 282), so, too, are they high-ranking public officeholders who should not be exempted, by virtue of the Compensation Clause, from the responsibilities and obligations that Congress in the Pay Acts has imposed on all other leading government officials. In light of the purpose of the Compensation Clause and the decisions of this Court, we submit that the Constitution does not preclude Congress from including federal judges in such legitimate, nondiscriminatory legislation.

The district court sought to avoid this analysis by labeling the Pay Acts as "direct" rather than "indirect" diminutions in compensation (79-983 J.S. App. 16a; 79-1689 J.S. App. 8a). In the district court's view, direct diminutions are unconstitutional as such, without regard to considerations of discrimination or judicial independence.[54] We believe this approach to be unsound. As the

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[54] It is not entirely clear what is meant by the terms "direct" and "indirect" diminutions. At one point, appellees seem to suggest (79-983 Motion to Affirm 30-31 n.27) that an "indirect" diminution is one that affects the public generally, such as the income tax (*O'Malley* v. *Woodrough*) or inflation (*Atkins* v. *United States*). See also *id.* at 28 n.26, 32-33; 79-1689 Motion to Affirm 25 n.14, 28-29. At the same time, appellees also appear to suggest that an "indirect" diminution is one that does not deal with judges' salaries "as such" (79-983 Motion to Affirm 31 n.27). However, neither appellees nor the district court have ever explained the grounds on which the Pay Acts are deemed to be "direct" diminutions—that the statutes apply to high-ranking government officials but not to all government employees or to the general population as a whole; that Congress focused on salaries as the express object of the legislation; that Congress, at least in the 1977 and 1978

Court of Claims recognized in *Atkins* v. *United States*, *supra*, 556 F.2d at 1045, 1057:

> A tax or other alleged diminution does not contravene the Clause when it "makes [no] inroads upon the independence of judges * * * ." [*O'Malley* v. *Woodrough*,] 307 U.S. at 282, 59 S. Ct. at 840. * * * The key to the decisions in *Evans* and *Miles*, and to the overruling of those cases in *O'Malley*, was the Court's view of the scope of protection needed to maintain an independent judiciary. This will guide our decision as well. * * * [O]nly diminutions that are discriminatory and that attack judicial independence present grounds for relief under Article III.

In our view, the Court of Claims correctly discerned that the guiding principle in construing the Compensation Clause should be "the scope of protection needed to maintain an independent judiciary."

The court below ignored this principle. By excluding considerations of judicial independence, the court has departed from the settled purpose of the Compensation Clause and stripped the Clause from its historical moorings. As the Court of Claims cautioned in *Atkins* v. *United States*, *supra*, 556 F.2d at 1049, "a mere exegesis of words is not to be preferred to an interpretation of the Clause in light of its widely acknowledged purpose." Moreover, there is no basis to believe that "direct" diminutions necessarily pose a greater risk to the judiciary or that the Compensation Clause was intended to furnish

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Pay Acts, explicitly referred in part to judges or the judicial branch (79-983 J.S. App. 32a; 79-1689 J.S. App. 22a); that Congress acted in an affirmative fashion to affect judicial salaries; or for some other reason. We note this issue to illustrate the uncertainties inherent in appellees' position that would make it difficult in future cases to apply their attempted distinction between "direct" and "indirect" diminutions.

greater protection against such diminutions.[55] On the contrary, this Court has recognized that "indirect" as well as "direct" diminishments fall within the proscription of the Compensation Clause. See *Evans* v. *Gore*, *supra*, 253 U.S. at 248-249, 254. In our view, the same standard—which we suggest is set out in *Woodrough*—is applicable to "direct" and "indirect" diminutions.[56]

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[55] For example, it is not at all apparent that the Pay Acts challenged here as "direct" diminutions would necessarily represent a more serious threat to judicial independence than would Congress' deliberate and invidious refusal to raise judges' salaries in the face of continued inflation, which under appellees' analysis would be an "indirect" diminution. Similarly, imposition of a higher income tax rate for government officials who enjoy life tenure would raise serious problems under the Compensation Clause even though only an "indirect" diminution would be involved. By contrast, a nondiscriminatory reduction of all government salaries, including those of judges, during a time of severe deflation—although arguably "direct"—would clearly be without invidious purpose or effect and therefore should not, in light of the object and history of the Compensation Clause, be deemed unconstitutional. Thus, although a "direct" diminution might more readily give rise to an inference that a statute would serve, in purpose or effect, to impair the independence of Article III judges or discriminate against them, we see no reason either to presume that any such "direct" diminution would invariably present a more substantial danger to an independent judiciary than would an "indirect" diminution or to hinge the constitutional protection on such labels.

[56] The decisions in *O'Donoghue* v. *United States*, 289 U.S. 516 (1933), and *Booth* v. *United States*, 291 U.S. 339 (1934), do not lead to a different conclusion. In *O'Donoghue*, the Court held, on certificates from the Court of Claims, that the courts of the District of Columbia were established under Article III of the Constitution and thus that the judges of those courts were within the statutory provision exempting from pay reductions during the Depression all " 'judges whose compensation may not, under the Constitution, be diminished during their continuance in office.' " The Court in *O'Donoghue* expressly limited its decision to the question whether District of Columbia judges were appointed under Article III and thus expressly exempted by Congress from the statute (289 U.S. at 529); in particular, the Court did not decide whether, in the absence of the statutory exemption, Congress could constitutionally have applied the salary reductions to Article III judges. In *Booth*, upon which appellees heavily rely (79-983 Motion to Affirm 28-30; 79-1689 Motion to Affirm 25-27), the

Court held, as conceded by the Solicitor General, that a reduction after an increase in a judge's salary, even though not a reduction below the salary in effect at the time of the judge's appointment to the bench, is a reduction in compensation (291 U.S. at 352). We do not challenge that holding here. Hence, if the Pay Acts are otherwise unconstitutional, they cannot be saved simply because the salaries nevertheless remain above the levels that existed at the time the judges assumed office. However, *Booth* does not bear on the question whether the nondiscriminatory failure to pay cost-of-living increases violates the Compensation Clause. Moreover, both *O'Donoghue* and *Booth* were decided prior to this Court's decision in *O'Malley* v. *Woodrough*, *supra*.

Nor, contrary to the assertions of the district court (79-983 J.S. App. 15a-16a) and of appellees (79-983 Motion to Affirm 28 n.26, 31 n.27; 79-1689 Motion to Affirm 25 n.14), are the decisions below supported by *Atkins* v. *United States*, *supra*. In *Atkins*, the plaintiff judges alleged that Congress' failure to maintain their purchasing power by raising their salaries during a period of inflation constituted a violation of the Compensation Clause. The court dismissed this contention, holding that "[i]ndirect, nondiscriminatory diminishments of judicial compensation, those which do not amount to an assault upon the independence of the [judiciary] or any of its members, fall outside the protection of the Compensation Clause * * * (556 F.2d at 1045). See also *Duplantier* v. *United States*, 606 F.2d 654, 669 (5th Cir. 1979), petition for cert. pending on other grounds, No. 79-1180 (filed Jan. 31, 1980). However, the court in *Atkins* nowhere suggested that "direct" diminishments would be tested by a different, more exacting standard. Indeed, the *Atkins* opinion suggested quite the opposite view, for it noted that *O'Malley* v. *Woodrough* "had no disagreement with *Evans* and *Miles* insofar as they determined that indirect incursions upon judicial salaries, as much as direct ones, were not tolerable under the Compensation Clause" (556 F.2d at 1045). See also 556 F.2d at 1048-1049. And, as discussed above (see pages 66-67, *supra*), *Atkins* expressly recognized (556 F.2d at 1045, 1057) that "the scope of protection needed to maintain an independent judiciary" is the guiding principle under the Compensation Clause, "that a mere exegesis of words is not to be preferred to an interpretation of the Clause in light of its widely acknowledged purpose," that "[a] tax or other alleged diminution does not contravene the Clause when it 'makes [no] inroads upon the independence of judges * * *,'" and that "only diminutions that are discriminatory and that attack judicial independence present grounds for relief under Article III."

CONCLUSION

The judgments of the district court should be reversed.

Respectfully submitted.

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*The Solicitor General has disqualified himself in these cases.

APPENDIX

28 U.S.C. (and Supp. II) 455 provides:

Disqualification of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

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